San Francisco

Law Library

436 CITY HALL

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

No. 12668

United States
Court of Appeals
for the Ninth Circuit.

EDWARD HERZINGER,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT,

Appellees.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 314)

Appeal from the United States District Court, for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12668

United States
Court of Appeals
for the Ninth Circuit.

EDWARD HERZINGER,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT,

Appellees.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 314)

Appeal from the United States District Court, for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Complaint	3
Answer to Amended Complaint	14
Answer of Defendant, Standard Oil Co. of California, a Corporation, to the Amended Complaint	9
Certificate	8
Explanation Requested by Jury of Instruction No. 22	23
Instructions to the Jury	25
Jury's Request for Explanation of Instruction No. 22	23
Motion for New Trial	47
Names and Addresses of Attorneys	1
Notice of Appeal	50
Notice of Court's Decision on Motion for New Trial	49
Order on Pre-Trial Conference	17
Proceedings in Chambers	536
Statement of Points and Designation of Portions of Record to Be Printed	539

INDEX PAGE

Transcript of Testimony 51

Verdict 47

Witnesses, Defendants':

Harmer, Francis

—direct 454, 457

—cross 463

—redirect 469

Nielson, Lee James

—direct 400, 431, 488

—cross 432, 490

—redirect 443

Odermatt, E. J.

—direct 52, 387, 470, 496

—cross 63

—redirect 75, 85

—recross 84

Ryan, Jacob A.

—direct 498

—cross 513, 519

—redirect 522

—recross 523

INDEX PAGE

Witnesses, Defendants'—(Continued):

Warner, William

—direct 480, 483

Witnesses, Plaintiff's:

Black, William Ramsey

—direct 229

—cross 236, 243, 244

Herzinger, Edward

—direct 259, 279, 486, 315, 524, 532

—cross 323, 332, 365, 369, 525

—redirect 378, 534

—recross 384

Klitz, William A.

—direct 190

—cross 205, 225

—redirect 227

Knapp, Dalton

—direct 185

—cross 188

—redirect 190

McLean, Mrs. Loretta

—direct 246

—cross 253

INDEX PAGE

Witnesses, Plaintiff's—(Continued):

Moseley, Ross Fred

—direct 86, 91, 465, 491, 493, 494

—cross 114, 118, 149, 168, 169, 468

—redirect 169, 468

—recross 177

Richards, Mrs. Katherine

—direct 256

—cross 258

NAMES AND ADDRESSES OF ATTORNEYS

ORVILLE R. WILSON, ESQ.,
First National Bank Building,
Elko, Nevada,

MESSRS. PARRY, KEENAN, ROBERTSON & DALY,
Fidelity Bank Building,
Twin Falls, Idaho,

For the Appellant.

MESSRS. GRISWOLD and VARGAS,
206 North Virginia Street,
Reno, Nevada,

A. L. PUCCINELLI, ESQ.,
Elko, Nevada,

JOHN S. HALLEY, ESQ.,
P. O. Box 1684,
Reno, Nevada, for O. J. Odermatt,

SAMUEL PLATT, ESQ.,
First National Bank Building,
Reno, Nevada, for Standard Oil Company of Calif.,

For the Appellees.

In the District Court of the United States
For the District of Nevada

Civil Action File No. 680

EDWARD HERZINGER,

Plaintiff,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and O. J. ODERMATT,

Defendants.

AMENDED COMPLAINT

For cause of action against above named defendants, plaintiff alleges:

I.

That plaintiff is a citizen of the State of Idaho; that defendant Standard Oil Company of California is a corporation incorporated under the laws of the State of Delaware; that the defendant O. J. Odermatt is a citizen of the State of Nevada.

II.

That the matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars.

III.

That on and prior to May 3, 1947, the defendant, O. J. Odermatt, acting for and on behalf of defendant Standard Oil Company of California and as its agent or employee, or both, sold, distributed, transported and delivered at Wells, Nevada, and

tributary points the petroleum products produced, refined and marketed by said defendant Standard Oil Company of California and that the said defendant Odermatt in connection with the performance of his said duties as such agent or employee, or both, of defendant Standard Oil Company of California, had, among other things, the power and authority to procure the services of persons to assist him in the performance of his said duties for said defendant, Standard Oil Company of California, and particularly to assist him in the sale, distribution, transportation and delivery of the petroleum products marketed by defendant Standard Oil Company of California.

IV.

That Contact, Nevada, and vicinity is a point tributary to Wells, Nevada; that on and prior to May 3, 1947, plaintiff was the owner and in the possession of those premises in the vicinity of Contact, Nevada, commonly called "Hot Springs," and more particularly described as follows:

> Southwest Quarter of the Southwest Quarter (SW¼SW¼) of Section Nine (9) and Northwest Quarter of the Northwest Quarter (NW¼NW¼) of Section Sixteen (16), Township Forty-five (45) North, Range Sixty-four (64) East, M.D.B. & M.,

on which the buildings in which plaintiff was operating a bathhouse, and other buildings separate from the bath house, grouped together along U. S. Highway No. 93, in which plaintiff was on and

prior to May 3, 1947, also operating a retail grocery, wine and liquor store and bar room with accessories, and tourist cabins and also an automobile service station, wherein and whereby plaintiff sold at retail petroleum products sold to him at wholesale by defendant Standard Oil Company of California; these latter buildings are hereinafter called the highway buildings.

V.

That shortly after noon of May 3, 1947, the defendant O. J. Odermatt in the course of the performance of his duties as agent or employee or both for defendant Standard Oil Company of California, in the sale, distribution, transportation and delivery of defendant Standard Oil Company of California's petroleum products was engaged in the sale and delivery to the plaintiff, Edward Herzinger, of petroleum products, to-wit: gasoline, of the defendant Standard Oil Company of California; that said gasoline was then and there being delivered from a truck tank into an underground storage tank on the premises above mentioned of plaintiff, which said tank was located in front of and near the highway buildings of the plaintiff; that the actual delivery of such gasoline was being done by an assistant procured by defendant O. J. Odermatt; that the said assistant in the delivery of said gasoline to the plaintiff so negligently did, managed and conducted the delivery of said gasoline into said underground storage tank that said gasoline became ignited; that from said burning gasoline

flames spread to the highway buildings and structures owned by the plaintiff; that said buildings and structures caught fire therefrom and burned so rapidly that said buildings and structures and their contents were thereby totally destroyed.

VI.

That the buildings and structures so destroyed as aforesaid were the following:

One cabin
One oil house
One canopy roof
One pump house
One store building
One lean-to
One bar room

That the value thereof immediately prior to their destruction as aforesaid was as follows:

Cabin	$ 625.79
Oil House	1188.94
Canopy roof	348.75
Pump house	438.75
Store building	1440.00
Lean-to	360.00
Bar room	5986.12

and the total value thereof as of said time was $12,540.00.

VII.

That in said buildings at the time of their destruction aforesaid, and totally destroyed therewith,

in such fire, was personal property owned by plaintiff Edward Herzinger as follows:

Furniture, fixtures and equipment;
Currency and silver;
Stock of merchandise consisting of petroleum products, groceries, beer, wines, liquors and tobacco.

That the value of said furniture, fixtures and equipment immediately prior to their destruction aforesaid was the sum of $11,977.45; that the value of said currency and silver immediately prior to its destruction was upwards of $2500.00; that the value of said stock of merchandise immediately prior to its destruction aforesaid was the sum of $16,761.36.

Wherefore, Plaintiff Prays Judgment Against Defendants for the sum of $12,540.00, value of buildings destroyed; for the sum of $31,238.81, value of personal property destroyed; and for his costs herein.

/s/ ORVILLE R. WILSON,

PARRY, KEENAN, DALY
and ROBERTSON,

By /s/ ORVILLE R. WILSON,
Attorneys for Plaintiff.

Service of a copy of Amended Complaint in the above-entitled action is hereby admitted and acknowledged this 13th day of July, 1948.

GRISWOLD & VARGAS,

JOHN S. HALLEY,

A. L. PUCCINELLI,

Attorneys for O. J. Odermatt.

By /s/ A. L. PUCCINELLI.

[Title of District Court and Cause.]

CERTIFICATE

The undersigned does hereby certify that he is one of the attorneys of record for plaintiff, Edward Herzinger. That on the 13th day of July, 1948, he served upon defendant Standard Oil Company of California, a corporation, a copy of Amended Complaint by mailing said copy to Samuel Platt, Esq., Attorney at Law, First National Bank Building, Reno, Nevada, Attorney for said defendant, Standard Oil Company of California. Said copy of Amended Complaint was enclosed in an envelope addressed to said Samuel Platt at the above-designated address, which said envelope was deposited in the United States Post Office, Elko, Nevada, for mailing all on said date.

/s/ ORVILLE R. WILSON,

One of the Attorneys

for Plaintiff.

[Endorsed]: Filed July 15, 1948.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, STANDARD OIL COMPANY OF CALIFORNIA, A CORPORATION, TO THE AMENDED COMPLAINT

Now Comes Standard Oil Company of California, a corporation, through its attorney, Samuel Platt, and answering the Amended Complaint on file herein, admits, denies, and alleges:

I.

This defendant admits the allegations of Paragraphs I and II.

II.

This defendant denies that on, or prior, to May 3, 1947, or at any other time, defendant, O. J. Odermatt, acting for and on behalf, or either or any, of defendant, Standard Oil Company of California, and as its agent or employee, or both, or any or either, sold, distributed, transported and delivered at Wells, Nevada, and tributary points the petroleum products, or any other products produced, refined and marketed, or any or either, by said defendant, Standard Oil Company of California; denies that defendant, Odermatt, at any time mentioned in said Complaint or at all, was an agent or employee, or any or either, of this defendant; denies that defendant, Odermatt, in connection with the performance of duties as agent or employee, or as agent and employee, of this defendant, had power or authority derived from this defendant to procure the services of any person

or persons to assist him in the performance of any duties for this defendant; and denies, specifically and generally, all allegations of said paragraph not hereinabove expressly and specifically denied.

III.

This defendant admits that Contact, Nevada, and vicinity, is a point tributary to Wells, Nevada; as to whether on and prior to May 3, 1947, or at any other time, plaintiff was the owner and in the possession of those premises in the vicinity of Contact, Nevada, commonly called "Hot Springs," as particularly described in said Amended Complaint, this defendant has not sufficient knowledge whereby to express a belief, and on information and belief denies the same. As to whether plaintiff was, on or prior to May 3, 1947, or at any other time, in possession of buildings alleged to have been upon said premises or was operating a bath-house or other buildings separate from the bath-house, or as to whether said buildings were grouped together along U. S. Highway 93, or whether plaintiff was, on or prior to May 3, 1947, or at any other time, operating a retail grocery, wine and liquor store, and bar-room with accessories, or any or either, or tourist cabins or an automobile service station, or any or either, this defendant has not sufficient information whereby to express a belief, and on information and belief denies the same.

This defendant admits that plaintiff sold, at retail, petroleum products sold to him at wholesale by

this defendant, Standard Oil Company of California.

IV.

This defendant denies that the defendant, O. J. Odermatt, performed any duties as agent or employee, or as agent and employee, of this defendant on the afternoon of May 3, 1947, as alleged in the Amended Complaint, or at any other time, or otherwise. As to whether the defendant, O. J. Odermatt, but not as an agent or employee, or both, for this defendant did, on the 3rd day of May, 1947, sell and deliver to the plaintiff this defendant's petroleum products or gasoline, or any or either, this defendant has not sufficient knowledge whereby to express a belief, and on information and belief denies the same. As to whether said gasoline was then and there, or at all, being delivered from a truck tank into an underground storage tank on any part or portion of plaintiff's premises, or at all, or whether said tank was located in front of, or near, the highway buildings of the plaintiff described in said Complaint, this defendant has not sufficient knowledge whereby to express a belief, and upon information and belief denies the same. As to whether the actual delivery of any gasoline, as alleged in said Complaint, was being done by an assistant procured by defendant, O. J. Odermatt, this defendant has not sufficient knowledge whereby to express a belief, and upon information and belief, denies the same. This defendant is informed and believes, and upon information and belief denies, that said, or any, assistant of the defendant, O. J.

Odermatt, or any other persons, negligently did manage or conduct or any or either, the delivery of said or any gasoline into said underground storage tank, or any other tank, so that said, or any, gasoline became ignited. This defendant admits on information and belief that on, or about, the 3rd day of May, 1947, that property alleged to be owned and possessed by the plaintiff was destroyed by fire, but as to whether plaintiff was the owner of said buildings or any thereof, or any of the contents thereof, this defendant has not sufficient knowledge whereby to express a belief, and upon information and belief, denies the same.

V.

As to the allegations of Paragraph VI. of said Amended Complaint, this defendant has not sufficient knowledge whereby to express a belief, and upon information and belief, denies, generally and specifically, each and every allegation in said paragraph.

VI.

As to the allegations of Paragraph VII of plaintiff's Amended Complaint, this defendant has not sufficient knowledge whereby to express a belief, and upon information and belief, denies, generally and specifically, each and every allegation in said paragraph.

VII.

As to the allegations of Paragraph VIII of plaintiff's Amended Complaint, this defendant has not sufficient knowledge whereby to express a belief,

and upon information and belief, denies, generally and specifically, each and every allegation in said paragraph.

Wherefore, this defendant, Standard Oil Company of California, a corporation, prays that it be hence dismissed with costs.

/s/ SAMUEL PLATT,
Attorney for Defendant, Standard Oil Company of California, a Corporation.

State of Nevada,
County of Washoe—ss.

Arthur Hodge, being first duly sworn, upon oath, deposes and says:

That he has been for some time last past, and is now, the Branch District Manager of the defendant, Standard Oil Company of California, a corporation, and makes this verification for and on behalf of said defendant, Standard Oil Company of California, that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

/s/ ARTHUR HODGE.

Subscribed and Sworn to before me this 4th day of August, 1948.

[Seal] /s/ CECILIA PRIEST,
Notary Public in and for the County of Washoe, State of Nevada.

[Endorsed]: Filed August 5, 1948.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now the defendant O. J. Odermatt, and for himself alone, and for no other defendant, answering the Amended Complaint of plaintiff on file herein, admits, denies and alleges as follows:

I.

Answering Paragraphs I and II of said Amended Complaint, said defendant admits all matters in said paragraphs contained.

II.

Answering Paragraph IV of said Amended Complaint, said defendant states that as to the averments therein contained in approximately Line 12, Page 2, and commencing with the words "in the possession of," and ending with approximately Line 24, Page 2, with the words "and tourist cabins and," said defendant is without knowledge or information sufficient to form a belief as to the truth of said averments, and each and every part thereof.

III.

Answering Paragraph V of said Amended Complaint, said defendant admits that shortly after noon of May 3, 1947, the defendant O. J. Odermatt was engaged in the sale and delivery to the plaintiff, Edward Herzinger, of petroleum products, to-wit, gasoline, of the defendant Standard Oil Company of California, and admits that said gasoline was then and there being delivered from a truck tank into

an underground storage tank on the premises described in said Amended Complaint, which said tank was located in front of and near the highway buildings described and alleged in said Amended Complaint; and admits that the actual delivery of such gasoline was being done by an assistant procured by defendant O. J. Odermatt. Further answering Paragraph V of said Amended Complaint, said defendant denies that said assistant in the delivery of said gasoline, or otherwise, or at all, to the plaintiff, or to any person whomsoever, or at all, did negligently or so negligently, or negligently at all, manage or conduct the delivery of said gasoline into said underground storage tank as to cause in any wise, or at all, said gasoline to become or be ignited. Further answering said Paragraph V of said Amended Complaint, and in particular, answering the averments therein contained reading as follows: "that from said burning gasoline flames spread to the highway buildings and structures owned by the plaintiff; that said buildings and structures caught fire therefrom and burned so rapidly that said buildings and structures and their contents were thereby totally destroyed," said defendant denies all of said averments, and each and every part thereof, said defendant denying each, every and all of the averments and each and every portion thereof, commencing with the words "that the said assistant in the delivery of said gasoline," and concluding with the words "thereby totally destroyed."

IV.

Answering Paragraph VI of said Amended Complaint, said defendant denies all matters and averments in said paragraph contained and each and every part thereof, and as to the items and values thereof set forth and alleged in said Paragraph VI of said Amended Complaint, said defendant denies that any item alleged in said paragraph is of the value therein alleged, or of any value whatsoever, or at all, and denies that the total value thereof, as of said time, or of any time, was the sum of Ten Thousand Three Hundred Eighty-eight and 35/100 Dollars ($10,388.35), or any sum whatsoever, or at all.

V.

Answering Paragraph VII of said Amended Complaint, said defendant denies all matters in said paragraph contained, and each and every averment thereof, and further denies that the value of the furniture or fixtures or equipment was the sum of Eleven Thousand Nine Hundred Seventy-seven and 45/100 Dollars ($11,977.45), or any other sum whatsoever, or at all; and denies that the value of currency and silver was upwards of, or of, the sum of Twenty-five Hundred Dollars ($2500.00), or any sum whatsoever, or at all; and denies that the value of stock of merchandise therein alleged was the sum of Sixteen Thousand Seven Hundred Sixty-one and 36/100 Dollars ($16,761.36), or any sum whatsoever, or at all.

VI.

Answering Paragraph VIII of said Amended

Complaint, said defendant states that as to each, every and all of the averments in said Paragraph VIII contained, he is without knowledge or information sufficient to form a belief as to the truth of any or all averments therein, and upon this ground denies all averments in said Paragraph VIII contained, and each and every part thereof.

Wherefore, said defendant prays that plaintiff take nothing by virtue of his Amended Complaint on file herein; and that said defendant be given and granted judgment against the plaintiff for his costs and disbursements herein incurred and for such other and further relief as to the Court may appear just and proper in the premises.

/s/ MORLEY GRISWOLD,

/s/ GEORGE L. VARGAS,

/s/ JOHN S. HALLEY,

Attorneys for
Said Defendant.

[Endorsed]: Filed October 16, 1948.

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL CONFERENCE

Pursuant to the Order heretofore made, the Pre-Trial Conference in the above-entitled action was held at Reno, Nevada, at 10:00 a.m. of September 9th, 1949, Messrs. R. P. Parry, John H. Daly and Orville R. Wilson appearing for plaintiff; Messrs.

John S. Halley, A. L. Puccinelli and George L. Vargas appearing for defendant E. J. Odermatt; and Samuel Platt, Esq., appearing for defendant Standard Oil Company of California,

It Is Hereby Ordered that the action taken at such Pre-Trial Conference is as follows:

Paragraphs I and II of the Amended Complaint are admitted.

As to Paragraph III of the Amended Complaint:

Standard Oil Company of California denies that on May 3, 1947, or at any other time involved in this action, defendant E. J. Odermatt was an employee or agent of the Standard Oil Company of California, or at any of the times mentioned in the Amended Complaint acted as an employee or agent.

Defendant Standard Oil Company's position is that the defendant E. J. Odermatt was acting as an independent contractor in regard to all matters alleged in the Complaint.

Defendant E. J. Odermatt takes the position that at all the times mentioned in the Complaint he was acting as agent or employee of the defendant Standard Oil Company.

The allegations contained between Lines 1 and 3 of p. 3 of the Answer of defendant Standard Oil Company are considered as amended to read as follows: This defendant admits that plaintiff sold at retail petroleum products produced by the defendant Standard Oil Company of California but denies that such petroleum products were sold to plaintiff at wholesale directly.

The defendant Standard Oil Company of California contends that the products of the Standard Oil Company of California with which we are concerned here were, by the Standard Oil Company of California, sold at wholesale to the defendant Odermatt.

As to the matters contained in Paragraph III of the Amended Complaint, plaintiff's contention is that Odermatt was acting as either an agent or employee of Standard Oil Company and that plaintiff purchased all of his petroleum products at wholesale from the Standard Oil Company through Mr. Odermatt, its agent or employee.

Defendant Odermatt contends that there is no sale from the Standard Oil Company to Odermatt but that the sale from Standard Oil to the plaintiff Herzinger was through Odermatt, defendant Odermatt acting as a distributor and/or agent for the Standard Oil Company, being compensated by a commission for the handling of the Standard Oil Products.

As to Paragraph IV of the Amended Complaint, defendant Odermatt admits that on May 3, 1947, the plaintiff was the owner of the property alleged in Paragraph IV of the Amended Complaint; admits that on the 3rd day of May, 1947, plaintiff was the owner of the premises therein described but for want of information denies that plaintiff was in possession of the premises, that plaintiff was operating the premises and operating those businesses which he describes in said paragraph; and defendant admits

plaintiff was then and there operating an automobile service station on said premises. Standard Oil Company desires that the question of ownership of the premises described in Paragraph IV of the Amended Complaint be left in abeyance until the Standard Oil Company has had an opportunity to further make inquiry as to the ownership of said premises but the Standard Oil Company denies all matters alleged in Paragraph IV which have been denied by the defendant Odermatt and particularly denies that said plaintiff sold on said premises at retail petroleum products sold to him at wholesale by defendant Standard Oil Company of California.

As to Paragraph V of the Amended Complaint:

Defendant E. J. Odermatt admits that shortly after noon of May 3, 1947, he was engaged in the sale and delivery to the plaintiff Edward Herzinger of gasoline of the defendant Standard Oil Company of California; defendant Odermatt admits that said gasoline was then and there delivered from a truck tank into an underground storage tank on the premises of plaintiff which said tank was located in front and near the highway buildings of plaintiff; defendant Odermatt admits that the actual delivery of said gasoline was being done by an assistant procured by E. J. Odermatt. Defendant Odermatt admits that on the said May 3, 1947, a fire occurred at the premises described in the Complaint before the delivery truck had left the said premises and while the said truck was at the physical point of the delivery upon

said premises. Defendant Odermatt denies that the said fire resulted from any negligence on the part of the assistant of said defendant Odermatt.

Standard Oil Company admits that said fire occurred at the time and place stated in the admission of the defendant Odermatt in regard to the time and place of said fire but denies that said fire was caused by any negligence on the part of said defendant Standard Oil Company or any of its agents or employees.

Defendants Odermatt and Standard Oil Company each deny that the gasoline being then and there delivered into the underground storage tank on said premises became ignited and said defendants also deny that burning gasoline flames spread into the highway buildings and structures owned by the plaintiff; and defendants each deny that the buildings and structures described in the Complaint caught fire from burning gasoline flames. Defendants Standard Oil Company and Odermatt each admit that the buildings and structures described in Paragraph VI of the plaintiff's Amended Complaint were destroyed by said fire, but each of said defendants deny that said buildings were destroyed by a fire resulting from burning gasoline flames.

As to Paragraph VI of the Amended Complaint: The value of said destroyed buildings and the amount of damage resulting from the destruction

by said fire are matters which will have to be determined by the jury from the evidence adduced at the trial.

As to Paragraph VII of the Amended Complaint, each of said defendants contend that they have no knowledge of the contents of said destroyed buildings or of the ownership or value thereof, and that the said matters are questions which will have to be decided by the jury from the evidence adduced at the trial.

As to Paragraph VIII of the Amended Complaint, each of the defendants admit that the said buildings were located adjacent to Mineral Hot Springs and abutting upon United States Highway No. 93 at a point north of Contact, Nevada. Each of the defendants deny all other matters and things alleged in said Paragraph VIII.

Wherever the pleadings show the name "O. J. Odermatt," said pleadings should read "E. J. Odermatt."

The trial of this case will be held at Carson City, Nevada, before a jury in the courtroom of the above-entitled Court on the 6th day of February, 1950, at 10:00 a.m.

Dated: This 20th day of October, 1949.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed October 20, 1949.

JURY'S REQUEST FOR EXPLANATION OF INSTRUCTION No. 22

Your Honor Judge Foley—

The jury cannot interpret the Instruction #22 with reference to inference which seems to be somewhat vague as our position as to form of evidence and the burden upon the plaintiff or the defendant.

"The proximate cause of an event is distinguished from a remote cause * * *." (Instruction 21) "If you do not find the driver was negligent, your verdict should be for the defendants. If he were negligent, but his negligence was not the proximate cause of the fire, etc. (Inst. 21) An interpretation would.

/s/ RUSSELL MILLS,
Foreman.

[Title of District Court and Cause.]

EXPLANATION REQUESTED BY JURY OF INSTRUCTION No. 22

The following is an attempt to answer your question in regard to Instruction No. 22:

Due to the fact that the cause of the fire is not shown by any direct evidence in this case, Instruction No. 22 declares that the plaintiff has the burden to prove by a preponderance of the evidence that none of the instrumentalities under plaintiff's control caused the fire. And the instruction goes on to say that if you find from the evidence that none of

the appliances did cause the fire and if you find from the evidence that shortly after noon on the 3rd day of May, 1947, the defendant E. J. Odermatt, through an assistant, was delivering gasoline to the plaintiff, and that said gasoline became ignited and flames spread to buildings and destroyed the buildings, and if you find that as a proximate result of that fire plaintiff has suffered damage, you are instructed as follows: That an inference then arises that the proximate cause of the fire was some negligent conduct on the part of the defendant Odermatt, or his assistant. That inference is a form of evidence. If you do not find any evidence contrary to the inference, the inference would support a verdict for the plaintiff. If there is evidence contrary to the inference, such inference and the contrary evidence must be weighed, having in mind that it is not necessary for a defendant to overcome the inference by a preponderance of the evidence. Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned. It follows, therefore, that in order to hold the defendant liable, the inference must have greater weight, more convincing force in the mind of the jury than the opposing explanation offered by the defendant.

If such a preponderance in plaintiff's favor exists, then the verdict should be for the plaintiff; but if it does not exist, if the evidence preponderates in defendants' favor, or if in the jury's mind there is an even balance as between the weight of the inference and the weight of the contrary explanation, neither

having the more convincing force, then the verdict should be for the defendants.

Proximate cause is that which in natural sequence produces a specific result, no other or independent things intervening—in other words, the real, actual or responsible cause.

The explanation now offered to you must be considered by you in connection with all the other instructions given.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed February 18, 1950.

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

Instruction No. 1

There are certain general principles of law to which the Court desires to call your attention.

You will understand that under our system the Court and the jury have a divided responsibility. It is the duty of the Court to decide all questions of law which may arise during the progress of the trial, and the duty of the jury to pass upon the facts. If the Court is unfortunate enough to make a mistake in deciding those questions of law, there is another court which may be appealed to, to correct those mistakes. It is, therefore, the duty of the jury to take the law as laid down by the Court, because if the jury should undertake to determine what the

law is, and should make a mistake, there is no way of remedying it. It is the province of the jury to pass upon the facts of the case, upon the credibility of the witnesses, and to apply the law to the facts of the case as they find the facts to be. The Court is just a little inclined to interfere with the province of the jury passing upon the facts of the case, as it is sensitive about having the jury undertake to determine what is the law of the case. With this understanding of our respective duties, the Court states to you the following general principles.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 2

If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all others.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 3

At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted.

You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 4

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourselves to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 5

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You must each decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 6

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 7

Passion, prejudice and sympathy have no place in your considerations or in your deliberations. The fact that one of the defendants is a corporation cannot and must not be considered by you. It is entitled to the same fair treatment and the same consideration at your hands as a private individual, no more and no less. It is your duty, without sympathy, prejudice or passion, to calmly consider the evidence as to how the fire occurred and upon a consideration of the evidence and the law applicable thereto render your verdict. In considering the evidence and attempting to determine the truth of the matter in controversy, you should not be influenced by sympathy for the plaintiff or prejudice against the defendants, nor by the fact that the plaintiff is a private individual and the defendant Oil Company a corporation. It is you duty to base your verdict solely and entirely upon the evidence and the law as I have given them in these instructions.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 8

In civil actions, and this is a civil case, the party who asserts the affirmative of an issue must carry the burden of proving it. In other words the "burden of proof" as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against the party asserting it. When the evidence

is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein. Should the conflicting evidence on either side of the issue be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative side of the issue.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 9

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence, which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not

in the relative number of witnesses, but in the relative convincing force of the evidence.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 10

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 11

In judging the credibility of witnesses you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony, or by the evidence that pertains to his motives.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 12

A witness false in one part of his or her testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence you shall believe that the probability of truth favors his or her testimony in other particulars.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 13

Discrepancy in a witness' testimony or between his testimony and that of others, if there were any, does not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of importance and should be seriously considered.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 14

The issues to be determined by you in this case are these:

First: Was the assistant of the defendant E. J. Odermatt negligent?

If you answer that question in the negative, plaintiff is not entitled to recover, but if you answer it in the affirmative, you have a second issue to determine, namely:

Was that negligence a proximate cause of any damage to the plaintiff?

If you answer that question in the negative, plaintiff is not entitled to recover, but if you answer it in the affirmative, you should then fix the amount of plaintiff's damage and return a verdict in plaintiff's favor against the defendant E. J. Odermatt; you then should find on a third question:

Was the defendant E. J. Odermatt a servant or employee of the defendant Standard Oil Company of California?

If you answer that question in the negative, you should not return a verdict against Standard Oil Company of California, but if you answer it in the affirmative, you then should determine a fourth question divided into parts (a) and (b), namely:

(a) Was it inherently necessary in the business of distributing petroleum products to employ assistants, or

(b) Did the defendant Standard Oil Company of California have notice of the employment of the assistant Lee Nielsen by the defendant E. J. Odermatt and make no objection to such employment?

If you answer both part (a) and part (b) in the negative, then you should not return a verdict against defendant Standard Oil Company of California, but if you answer either part (a) or part (b) in the affirmative and you have previously found in the plaintiff's favor on the other issues, your verdict should be in plaintiff's favor against both the defendant E. J. Odermatt and the defendant Standard Oil Company of California.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 15

In this action there are two defendants, one of whom, Standard Oil Company of California, is sued upon the theory that the other, E. J. Odermatt, was its servant at the time of the events out of which the accident occurred. If you find that E. J. Odermatt is not liable, then you will not have to consider the nature of his relationship with Standard Oil Company of California, because in that event the Company may not lawfully be held liable even if E. J. Odermatt was its servant. But if you find the defendant E. J. Odermatt liable, then it will become necessary for you to determine whether at the time of the accident he was a servant of Standard Oil Company or whether he was acting for it as an independent contractor. The employer of a servant is liable to third persons for negligence of his servant, if the servant himself is liable, but the em-

ployer of an independent contractor is not liable to others for negligence of the contractor.

Both a servant and an independent contractor perform services for another person, but there is a very important distinction between them. An independent contractor is one who performs service for another under an arrangement which obligates him as to the results to be accomplished and who is under the employer's control only as to such results, but who is not subject to control as to his physical movements, conduct and methods of doing the job. A servant on the other hand is one who is engaged to render services within the scope of such arrangement as he and the one who engages him may agree and he may be paid either wages, commissions or otherwise, and who performs such services subject to the right of control by the employer as to the details, conduct, method and manner of doing the job. The relation of master and servant exists when one is a servant as herein defined.

An independent contractor is at liberty to consider and follow any suggestions that his employer may make, and his employer may make any suggestions or requests prompted by his own wishes, but these things do not change an independent contractor into a servant so long as he retains the right of control over his physical movements, conduct and method of doing the job.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 16

The contract between the defendant Odermatt and the defendant Standard Oil Company of California contains the statement that the defendant Odermatt is an independent contractor and not a servant of the defendant Standard Oil Company of California, and statements to the effect that the defendant Standard Oil Company of California shall not be liable for injury or damage caused by the negligence of the defendant Odermatt or his employees. These statements, of themselves, neither establish that the defendant Odermatt is, in fact, an independent contractor, nor do such statements, of themselves, relieve the defendant Standard Oil Company of California from liability for injury or damage to the plaintiff, if such injury or damage is caused by the negligence of the defendant Odermatt or his assistant. In determining whether, at the time of the fire at Mineral Hot Springs, the defendant Odermatt was an independent contractor or a servant of the defendant Standard Oil Company of California, you are to consider the entire contract together with all of the facts and circumstances surrounding the relationship between the two defendants; and you are to decide, from said contract and from all such facts and circumstances, which of the defendants has the right and power, as a practical matter, to control the actions of the defendant Odermatt in the details, conduct, method and manner of sale and delivery of the petroleum products of the defendant Standard Oil Company of California. If the defendant Standard Oil Com-

pany of California had such right and power, whether it had been exercised or not, you should find that the defendant Odermatt was a servant of the defendant Standard Oil Company of California is liable for any injury or damage to the plaintiff found by you to have been proximately caused by the negligence, if any you find, of the defendant Odermatt or his assistant while acting within the scope of their authority.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 17

The plaintiff is not bound by any agreement between the defendant E. J. Odermatt and the defendant Standard Oil Company of California limiting the liability of the defendant Standard Oil Company of California for negligence of the defendant E. J. Odermatt or his assistant or assistants unless it is shown that the plaintiff had knowledge of such agreement.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 18

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively established the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact, which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts "as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

It is noted that the inference arises only from established foundation facts. The inference itself cannot supply the foundation facts from which the inference arises. Liability cannot result from an

inference upon an inference or a presumption upon presumption.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 19

At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 20

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science

or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 20-A

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 21

The mere fact that an accident happened—that the fire happened—considered alone, does not support an inference that some party, or any party, to this action was negligent. The burden is upon the plaintiff in this case to prove by a preponderance of the evidence not only that the driver who

delivered the gasoline was negligent in the way he delivered it, but also that his negligence if any was the proximate cause of the fire.

The proximate cause of an event is distinguished from a remote cause, and means that which, in a natural and continuous sequence, unbroken by any new cause, produces the event.

If you do not find the driver was negligent, your verdict should be for the defendants. If he were negligent, but his negligence was not the proximate cause of the fire, your verdict should still be for the defendants.

If the fire did occur due to some cause other than the driver's negligence, then the plaintiff should not recover, whether the driver was negligent or not.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 22

If you believe from the evidence that the plaintiff Herzinger owned or controlled the underground storage tanks and the appliances in the buildings including all electric wiring, power plant, oil refrigerator, electric refrigerator, butane water heater, butane stove, motor in panorame machine, motor in juke box, refrigerator compressor and motor, then the plaintiff has the burden in this case to prove by a preponderance of the evidence that the fire was not caused by said appliances or any of them, or by any defect in any of them. If you find that the fire was not caused by any of those

appliances, and if you further find that there was an accidental occurrence as claimed by plaintiff, namely: That shortly after noon on the 3rd day of May, 1947, the defendant E. J. Odermatt through an assistant was delivering gasoline to the plaintiff and that said gasoline became ignited and flames spread to buildings owned by the plaintiff destroying them; and if you should find that from that accidental event, as a proximate result thereof, plaintiff has suffered damage, you are instructed as follows: An inference arises that the proximate cause of the occurrence in question was some negligent conduct on the part of the defendant, E. J. Odermatt or his assistant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant E. J. Odermatt, to rebut the inference by showing that he or his assistant did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure on his part or on the part of his assistant.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 23

In determining whether the defendant E. J. Odermatt's assistant Lee Nielsen was negligent you may consider, as bearing upon this question, whether the said Lee Nielsen left the tank truck unattended at a time when gasoline was flowing from the tank truck to the underground tank, providing you find that Lee Nielsen's absence from the tank was the proximate cause of the fire.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 24

If, adhering to the Court's instructions, you should find that plaintiff is entitled to a verdict against the defendant, E. J. Odermatt or the defendants E. J. Odermatt and Standard Oil Company of California, it then will be your duty to award plaintiff such amount of damages as will compensate him reasonably for all detriment suffered by him which was proximately caused by the negligence of the defendant, E. J. Odermatt or his assistant, whether such detriment could have been anticipated or not.

Should your decision be to award damages to the plaintiff, in arriving at the amount of the award, you shall determine each of the items of claimed detriment which I now am about to mention, provided that you find it to have been suffered by him and as a proximate result of the negligence of the defendant E. J. Odermatt or his assistant.

Such sum as will reasonably compensate said plaintiff for damages to his buildings, furniture, fixtures and equipment; currency and silver; and stock of merchandise. That sum is equal to the difference in the fair market value of the property immediately before and after the injury; provided, however, that if the injury has been repaired, or be capable of repair, so as to restore the fair market value as it existed immediately before the injury, at an expense less than such difference in value, then the measure of damage is the expense of such repair rather than such difference in value. Even if you should find that property of said plaintiff was damaged in the accident beyond repair, but that nevertheless it had a market value after the accident, as to such property you will award said plaintiff a sum equal to the difference between the fair market value of the property as it was immediately before the accident and its fair market value in its damaged condition following the accident. In determining the sum that will reasonably compensate said plaintiff for damages to his buildings you may consider the cost of replacing said building.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 25

When one does not use reasonable diligence to care for his own property and any damage is thereby aggravated as a result of such failure, the liability

of another whose negligence may have been a proximate cause of the original injury should be limited by the amount of damages that would have been suffered if the injured party himself had exercised the diligence required of him.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 26

You have been instructed on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages, and the fact that they have been given to you should not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 27

You will be given forms of verdicts for both plaintiff and defendants.

I hereby instruct you that you may bring in a verdict for the plaintiff against both defendants, or for the plaintiff and against the defendant E. J. Odermatt alone, or for both the defendants.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 28

Your verdict must be unanimous. When you retire to the jury room to deliberate you will select one of your number as foreman and he or she will sign your verdict for you. You will then return into court with the verdict. Your foreman will represent you as your spokesman in the further conduct of this case in the court. The Clerk will hand you the forms of verdict.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed February 17, 1950.

In the District Court of the United States of America, in and for the District of Nevada

EDWARD HERZINGER,

Plaintiff,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT,

Defendants.

VERDICT

We, the jury in the above entitled cause, find for the defendants E. J. Odermatt and Standard Oil Company of California.

Dated: This 18th day of February, 1950.

/s/ RUSSELL MILLS,
Foreman.

[Endorsed]: Filed February 18, 1950.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The plaintiff moves the Court to set aside the verdict returned in the above entitled action on February 18, 1950, and the Judgment entered therein on February 18, 1950, and to grant a new trial on the following grounds:

1. The evidence was insufficient to justify the verdict in that there was no substantial evidence to

show that defendant Odermatt or his assistant in the delivery of gasoline to the plaintiff on May 3, 1947, exercised due care, and in fact the evidence disclosed as a matter of law that defendant Odermatt's assistant was negligent.

2. The Court erred in overruling plaintiff's objection to the testimony of the witness Jacob A. Ryan, under which rulings of the Court the witness was permitted to invade the province of the jury and to answer hypothetical questions which did not contain all of the elements of fact established by the evidence in this case and which contained certain elements of fact not established by such evidence.

3. The Court erred in refusing to instruct the jury that: "If you find that the defendant E. J. Odermatt is not an agent of the defendant Standard Oil Company of California but the defendant Standard Oil Company of California has represented to the plaintiff that E. J. Odermatt was its agent and thereby caused plaintiff justifiably to rely upon the care or skill of such apparent agent or his assistants then the defendant Standard Oil Company of California is subject to liability to the plaintiff for harm caused by the lack of care or skill of the defendant E. J. Odermatt or his assistants the same as if the defendant E. J. Odermatt were the agent of the defendant Standard Oil Company of California," as requested by plaintiff.

4. The Court erred in explaining instructions No. 21 and 22 by instructing the jury over plaintiff's objection that: "Plaintiff's burden of proving

negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned," such instruction being, under the circumstances, misleading and prejudicial to plaintiff.

This motion is based upon the records and proceedings in this action.

/s/ ORVILLE R. WILSON,
/s/ R. P. PARRY,
/s/ J. R. KEENAN,
/s/ T. M. ROBERTSON,
/s/ JOHN H. DALY,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.
[Endorsed]: Filed February 27, 1950.

[Title of District Court and Cause.]

NOTICE OF COURT'S DECISION ON MOTION FOR NEW TRIAL

To Edward Herzinger, Plaintiff Above Named, and to Parry, Keenan, Robertson & Daly, and to Orville Wilson, His Atorneys:

You, and Each of You, Will Please Take Notice that on the 23rd day of June, 1950, the above entitled Honorable Court entered its order denying your motion to set aside the verdict returned in the above-entitled action on February 18, 1850, and the judgment entered therein on said day and to grant a new trial.

Dated at Reno, Nevada, this 26th day of June, 1950.

GRISWOLD, REINHART & VARGAS,
A. L. PUCCINELLI and
JOHN S. HALLEY,
By /s/ JOHN S. HALLEY,
Attorneys for Defendant
O. J. Odermatt.

Receipt of Copy acknowledged.
[Endorsed]: Filed July 3, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That Edward Herzinger, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment entered in this action on February 18, 1950, and from the order denying plaintiff's motion for new trial entered in this action on June 23, 1950.

/s/ ORVILLE R. WILSON,
/s/ R. P. PARRY,
/s/ J. R. KEENAN,
/s/ T. M. ROBERTSON,
/s/ JOHN H. DALY,
Attorneys for Plaintiff.

[Endorsed]: Filed July 21, 1950.

In the District Court of the United States,
in and for the District of Nevada

No. 680

EDWARD HERZINGER,

Plaintiff,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT,

Defendants.

Before: Hon. Roger T. Foley, Judge.

February 8 to 16 Incl., 1950
Carson City, Nevada

TRANSCRIPT OF TESTIMONY

Be It Remembered, That the above-entitled matter came on regularly for trial before the Judge sitting with a jury, at Carson City, Nevada, on Wednesday, the 8th of February, 1950, at 10:00 o'clock a.m.

Appearances:

PARRY, KEENAN, ROBERTSON & DALY, By

R. P. PARRY, ESQ.,

JOHN H. DALY, ESQ., and

ORVILLE R. WILSON, ESQ.,
Attorneys for Plaintiff.

SAMUEL PLATT, ESQ.,
Attorney for Defendant Standard Oil Company of California.

JOHN S. HALLEY, ESQ.,

A. L. PUCCINELLI, ESQ.,

GEORGE L. VARGAS, ESQ.,
Attorneys for Defendant E. J. Odermatt.

The following proceedings were had:

Mr. Daly: Call the defendant Odermatt under Rule 43(b), if the Court please.

E. J. ODERMATT

being duly sworn, testified as follows:

Direct Examination

By Mr. Daly:

Q. Will you state your name?

A. E. J. Odermatt.

Q. Where do you reside, Mr. Odermatt?

A. Wells, Nevada.

Q. What is your business?

A. I operate two lines for the Standard Oil Company as a wholesale distributor.

Q. I presume then that you sell petroleum products out of Wells that are consigned to you by the Standard Oil Company of California?

A. That is right.

Q. And you were so engaged in May of 1947, is that correct? A. Yes, sir.

(Testimony of E. J. Odermatt.)

Q. What territory do you have, Mr. Odermatt?

A. Well, I have the whole—let us see—well, our boundary runs to the Idaho line from Wells as far west as Deeth and as far east as Pequop Summit, and to the south it comes through just before you come to Currie and runs through to the White Pine County line, takes in all of Ruby Valley.

Q. Ruby Valley then is the general territory, in addition to [2*] that north?

A. Yes, that is south of Wells.

Q. And that territory, I presume, is fixed by the Standard Oil Company, is that correct?

A. That is right. They have several plants throughout that part of the country and each distributor is given territory that he operates.

Q. And the limits of the territory are fixed by the Standard Oil Company?

A. That's right.

Q. How many outlets did you have in that area, Mr. Odermatt, do you know?

A. Total outlets of all types?

Q. Take first the dealers, the service station operators? A. Seven.

Q. And then what other outlets do you have?

A. Well, we have, I would say, approximately 150 outlets.

Q. You say one hundred fifty?

A. Approximately, yes.

Q. Those are in this large area that you told us about? A. That's right.

*** Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

(Testimony of E. J. Odermatt.)

Q. I presume they are ranchers—is that one class of your outlet?

A. Practically all of our trade are either home accounts in town or out of town and agriculture and dealer. [3]

Q. When you forward petroleum products to a dealer or service station operator, you make out an invoice, I presume? A. Right, correct.

Q. Were the forms for those invoices furnished by the Standard Oil Company of California?

A. That's correct.

Q. Handing you, Mr. Odermatt, what has been marked for identification as Plaintiff's Exhibit 1, I will ask you to state if that is a typical invoice prepared by either you or one of your employees for the delivery of petroleum products to dealers?

A. That is a typical invoice, yes.

Q. Can you tell us what particular outlet that exhibit refers to?

Mr. Platt: May I see the exhibit before we make inquiries?

The Court: Yes. I think it would be better to introduce it before we give it to the witness.

Mr. Daly: It should have been offered, yes, and I will do that at the present time, if the Court please.

Mr. Platt: We have no objection.

Mr. Halley: No objection.

The Court: It will be admitted as Plaintiff's Exhibit No. 1.

Q. Now I will ask you again, Mr. Odermatt, if

(Testimony of E. J. Odermatt.)

you can tell us [4] what particular outlet that exhibit shows delivery of products?

A. Shows delivery to Ed Herzinger, Contact, Nevada.

Q. How many copies of those invoices were prepared, Mr. Odermatt? A. Five.

Q. And how many of those went to Standard Oil Company of California?

A. That varies, depending on the type of delivery. On credit delivery, two of them. On cash delivery, we sent one, or two dealer accounts—I will correct that—on dealer accounts we send two, regardless of whether it is credit or cash.

Q. And this was a dealer account, is that correct? A. That is correct.

Q. What departments were the two copies sent to of Standard Oil, do you know?

A. I do not know.

Q. What do you do with them?

A. We send them in to the district office at Salt Lake City. Where they go from there, I am not in a position to say.

Q. Now in the case of a dealer account, Mr. Odermatt, do you collect for the petroleum products delivered?

A. That is a general practice on dealer accounts, to collect cash on every delivery.

Q. By cash I presume you are including checks?

A. Checks. We take in credit cards as cash, credit card slips. [5]

Q. You spoke of credit cards, Mr. Odermatt,

(Testimony of E. J. Odermatt.)

how did you handle the produce, or reimburse for the produce, that a dealer would let out on a credit card of Standard Oil Company?

A. We have a regular form, we call S-29 form, that we list all credit card slips on that form and take that in as a credit and the dealer is given a copy.

Q. Handing you what has been marked Plaintiff's Exhibit 2 for identification, I will ask you if that is a typical form which you were testifying about, the S-29? A. That is right.

Q. And that is typical? A. That's right.

Q. You stated also that you collected for the Standard Oil and you did it by cash, which would include checks. I will ask you, Mr. Odermatt, if Plaintiff's Exhibit 3 for identification is a check given you by Mr. Herzinger for Standard Oil products delivered?

A. Yes, I would say that is a check.

Q. And was that check handled by you in the same manner as other payments received for petroleum products of Standard Oil?

A. That's right.

Mr. Daly: We will offer in evidence Plaintiff's Exhibits 2 and 3.

Mr. Platt: May I inquire a moment, your Honor?

The Court: Yes, sir. [6]

Q. (By Mr. Platt): Are you acquainted with Mr. Herzinger's signature?

A. I wouldn't be able to identify it. The thing

(Testimony of E. J. Odermatt.)

I looked at there, Mr. Platt, we have an endorsement stamp that we use on checks and I do recognize that particular stamp.

Q. You recognize the endorsement stamp?

A. Yes. As far as the signature, I wouldn't swear to Mr. Herzinger's signature. I have seen it many times and I have received quite a few checks from Mr. Herzinger.

Q. But you are fairly certain Mr. Herzinger gave you that check? A. Yes.

Q. And with respect to Plaintiff's Exhibit No. 2 for identification, there again appears what purports to be the signature of Mr. Herzinger?

A. Yes.

Q. I suppose you cannot recognize that?

A. No, I wouldn't say that is Mr. Herzinger's signature. That is probably some employee that signed that for him. That is the customary form that we do pick up from our dealers. This was an older form. At that time the dealer was not required to sign this. The new form the dealer is required to sign at the time we pick it up.

Q. Can you identify this form as outlining and stating upon it the delivery of gasoline of Mr. Herzinger and the sale of [7] gasoline by him at that particular time mentioned?

A. The only thing, this is mentioned August 2, 1946. It was a customary practice to pick these up and allow the dealer the same as cash for them. In other words, we honor the credit cards that he has

(Testimony of E. J. Odermatt.)

taken in, either for his bill or for merchandise, the same as cash.

Q. Can you testify whether this exhibit form was in full force and effect at or about the first day of May, 1947?

A. That same form at that time was being used.

Q. Was being used?

A. Yes, that was being used at that time.

Q. And when these forms were signed, did you keep them in your files?

A. We sent one copy to Salt Lake and kept one copy in our own files.

Mr. Platt: I think that is all, your Honor. I have no objection to the exhibits.

Mr. Halley: No objection.

The Court: Exhibit 2 and Exhibit 3 will be admitted in evidence.

Q. (By Mr. Daly): I might ask you, Mr. Odermatt, if your signature appears on Exhibit No. 2?

A. No, that is not my signature. That is my wife's signature.

Q. She was signing these for you?

A. She does my office work. [8]

Mr. Daly: At this time I would like to give these exhibits to the jury. I wonder if it might be agreed to by the Court and counsel that as to these, and all exhibits, that reading of the exhibits may be

(Testimony of E. J. Odermatt.)

waived and counsel may refer to the exhibits at any time during the trial.

Mr. Platt: Your Honor, please, I have in mind certain exhibits——

The Court: It might be a little bit hazardous to adopt that as a general rule. Something might come in that you would want to read to the jury.

Mr. Daly: The only thing I have reference to, I didn't want a waiver of the right to refer to the exhibits by not reading them to the jury at the time they were introduced.

The Court: Is that a reasonable suggestion, Mr. Platt?

Mr. Platt: Well, I have in mind submitting and offering in evidence certain exhibits, portions of which I expect to read to the witness for the benefit of the jury and your Honor. Of course, if an exhibit is admitted in evidence, I assume that under prevailing practice it may be used as evidence and may be argued to the jury upon the argument of the case.

The Court: Also may be taken by the jury to their jury room unless it is in the nature of a deposition.

Mr. Halley: That could be clarified in this way, if the Court please, that we waive the right to read them to the [9] jury when they are introduced, but reserve the right to read them at any time we may select.

The Court: How is this for a suggestion—that

(Testimony of E. J. Odermatt.)

we leave to counsel's discretion as to reading them, with the understanding no right to use the exhibits or portions of them is waived.

All Counsel: That is agreeable.

Q. Now, Mr. Odermatt, what did you do with the money that you collected for petroleum products of Standard Oil Company?

A. What do you mean by money?

Q. Checks or cash?

A. Well, the checks were sent to the Standard Oil office in Salt Lake daily. The cash was deposited in the bank and a check drawn on that in the same amount that was deposited and mailed with the checks to Salt Lake.

Q. Did you do that every day?

A. That's right.

Q. Is it correct, Mr. Odermatt, that you were instructed by the Standard Oil Company of California not to sell petroleum products on credit unless those credits were approved by the Standard Oil Company?

Mr. Platt: That question, if the Court please, assumes something in evidence that is not in evidence. Of course, it is a leading question besides and we object on those two grounds. [10]

The Court: This is sort of a cross-examination.

Mr. Daly: It is.

The Court: Objection will be overruled. Answer the question.

Q. Do you remember the question?

A. Well, I couldn't answer the question yes or

(Testimony of E. J. Odermatt.)

no, the way you state it, because the Standard Oil Company allows me to sell on credit at their risk if they give their approval first. If I sell without their approval, I sell at my risk.

Q. I think that straightens the matter out, thank you. Now how were you paid for your services rendered Standard Oil, Mr. Odermatt?

A. I was paid by a commission at the end of each month.

Q. And that was based, I presume, on the amount of petroleum products you sold?

A. That's right.

Q. In addition to selling products for Standard Oil Company, Mr. Odermatt, did you also collect rent for the company owned facilities on the property of Mr. Herzinger?

A. Collected rentals that were issued by statement monthly, yes.

Q. You speak of a statement showing rentals. I will hand you Plaintiff's Exhibit 4 marked for identification, and ask you what that is?

A. That is an invoice billing the rental on this particular [11] property.

Q. Does your signature appear on there?

A. Yes.

Q. Was this the type of invoice which was in use at the date of May 1, 1946, and also at the time of the fire up there?

A. I wouldn't say it is exactly; I think it is the same. It is the same one that was in use at that time.

(Testimony of E. J. Odermatt.)

Q. This method of collecting the rent was the same at the time of the fire, is that correct?

A. Yes, sir.

Mr. Daly: I offer Plaintiff's Exhibit No. 4 in evidence.

Q. (By Mr. Platt): Mr. Odermatt, there appears on this alleged invoice rent on SS6441 for May, 1946, four six six, what does that mean?

A. That is the particular service station number outlet.

Q. For what was the rent collected?

A. That was for use or rental on two pumps that are located on the premises.

Mr. Platt: We have no objection.

Mr. Halley: No objection.

The Court: It may be admitted, No. 4.

Q. (By Mr. Daly): I ask you, Mr. Odermatt, if these forms, which are Plaintiff's Exhibits 1, 2 and 4, are the forms which were in use by the Standard Oil Company of California at the time of [12] the fire at Mineral Hot Springs?

A. These are the forms in use in 1946. I would say they are similar to forms in use in 1947.

Q. Was the method of doing business, as far as you and the Standard Oil Company of California are concerned, any different at the time of the fire than it was at the date of the exhibits there?

A. No.

Q. You had employed, I believe, as one of your drivers, Lee Nielson in May of 1947, is that correct?

A. That is correct.

(Testimony of E. J. Odermatt.)

Q. How long had he been helping you with the delivery of petroleum products?

A. I would say approximately one year at that date.

Q. Did any representative of Standard Oil Company of California ever object to your employment of Lee Nielson in his delivery of petroleum products for you? A. No, sir.

Q. Was Mr. Nielson making a delivery of petroleum products to your Mineral Hot Springs on the date of the fire, May 3, 1947?

A. Mr. Nielson had made delivery, the delivery was completed.

Q. But he was the one who took the petroleum products there? A. That's right.

Mr. Daly: That's all. [13]

Cross-Examination

By Mr. Platt:

Q. As I understand you, you employed Mr. Nielson independently of any suggestions made by the Standard Oil Company of California?

A. That is right.

Q. Standard Oil never suggested the name of any individual employee in your service?

A. No, sir.

Q. Under your relations with Standard Oil Company of California, did you have exclusive right and privilege of employing such employees as you thought were necessary for the conduct of your business?

(Testimony of E. J. Odermatt.)

A. Yes, I was never told anything to the contrary.

Q. You were asked the question whether Standard Oil Company of California objected to the employment of Mr. Nielson and you testified that they did not. Well, as a matter of fact, they didn't even suggest your employment of Mr. Nielson, did they?

A. That's right.

Q. And that you had the exclusive and independent right and privilege to employ Mr. Nielson or anybody else you saw fit? A. That's right.

Q. Without any control whatever on the part of Standard Oil? A. That's correct.

Q. Who paid Mr. Nielson? [14]

A. I paid him myself.

Q. Standard Oil didn't pay Mr. Nielson for services rendered you? A. No, sir.

Q. You paid Mr. Nielson personally and out of your own private pocket? A. Yes.

Q. Who owned and operated the trucks that you use in the service?

A. They are my own personal trucks.

Q. None of them were owned by Standard Oil Company of California? A. No, sir.

Q. Who paid for the maintenance of those trucks or repairs upon the trucks?

A. That was my responsibility.

Q. Standard Oil was under no obligation at all to incur that expense? A. That's right.

Q. All that expense was incurred by you independently? A. Yes, sir.

(Testimony of E. J. Odermatt.)

Q. Out of your own private pockets?

A. Yes, sir.

Q. Did you have any other employees in and about the business which you operated? [15]

A. The only employee outside myself was my wife, who takes care of our office work.

Q. And she received wages or compensation for services rendered? A. Yes, sir.

Q. And who paid her? A. I paid her.

Q. Standard Oil paid no part or portion of her wages? A. That's correct.

Q. When you collected monies for the sale of gasoline, Mr. Odermatt, you say that some of the receipts were in checks and others were in cash. Have you a private account in any bank any place in which you deposit checks or monies or cash received for the sale of gasoline?

A. We deposit no checks made out to Standard Oil Company in our account.

Q. In your personal account?

A. That's right. When we deposit the cash in our personal account, we issue Standard Oil Company a personal check to cover.

Q. Let me see if I understand that. The checks and the cash that you collected for the sale of petroleum products were deposited in your personal account?

A. No, sir. The checks were mailed to Salt Lake daily. The cash was deposited in our personal account and we drew a check [16] on our personal account in the equivalent amount.

(Testimony of E. J. Odermatt.)

Q. Then the checks were endorsed and sent to Salt Lake? A. That's right.

Q. And the cash deposited in your personal account?

A. And check issued covering it.

Q. And then you issued checks to the Standard Oil Company for the particular invoice or invoices represented by the checks?

A. In an equivalent amount for each day's business.

Q. I understood you to state that Standard Oil paid you for your services a commission?

A. That's right.

Q. That is the way you received your compensation? A. That's right.

Q. I also understood you to say that you are privileged to give some of your patrons credit, is that true?

A. We were privileged to give anybody credit that they would endorse or we had credit approval, then that would be their responsibility. They didn't tell us we could give credit to anybody. If we gave credit without an endorsement, it was our responsibility. In other words, if the bill was not paid or——

Q. (Interrupting): You had the right to give credit to anybody you saw fit, providing you assumed the responsibility of a bad debt, is that the idea? A. That's right. [17]

Q. And you enjoyed that privilege during the

(Testimony of E. J. Odermatt.)

years 1946 and 1947 and up to the time that this fire occurred? A. That's right.

Q. Now, Mr. Odermatt, you were, prior to the occurrence of the fire here, under written contractual relations with the Standard Oil Company of California, were you not?

A. That is correct.

Q. I hand you here what purports to be an original wholesale distributor agreement, entered into on the 26th day of August, 1944, between Standard Oil Company of California and yourself, and will ask you if you recognize your signature on this agreement and state whether it is the original agreement entered into?

A. Yes, sir, that is my signature.

Mr. Platt: We offer it in evidence, your Honor.

Mr. Parry: May we see it? I wonder if at some other time——

The Court: We could defer the ruling. Would it interrupt your examination? Any objection to proceeding with your examination, subject to motion to strike if the exhibit is rejected?

Mr. Platt: No objection.

The Court: You will proceed then, Mr. Platt.

Q. Mr. Odermatt, there seems to be included, as part of this agreement, some additional documents and papers, together with [18] a plat or a map——

The Court: Perhaps this agreement had better be marked for the record as Standard Oil proposed Exhibit A for identification.

Q. (Continuing): ——and three or four other

(Testimony of E. J. Odermatt.)

documents. Will you state, Mr. Odermatt, whether your signature appears on all of those additional documents? A. Yes sir.

Q. And they are likewise signed by a representative of Standard Oil Company of California?

A. Well, there are some of these—I believe all of them are. I didn't pay that particular attention. They are all signed except one, which was a termination of an old one and starting a new one.

Mr. Platt: Well, if counsel have any exception or objection with reference to statement on that other paper, we will hear from you later.

Mr. Wilson: Thank you.

Q. Mr. Odermatt, I want to call your attention to this wholesale distributor agreement which you have just identified, without reading the entire agreement, which I may be required to do if counsel for the other side insists upon it—I want to call your attention to three paragraphs of this agreement. The first paragraph to which I desire to call your attention reads as follows: "Distributor shall pay and bear all the expense of [19] operating said plant, including, but without limiting the generality of the foregoing expense of storing, handling, selling and delivery of said products, light, water, power, telephone, telegraph, postage, money orders, heat and salaries, or other compensation of distributor's employees. Distributor shall pay all license fees and taxes on motor equipment which distributor uses for the sale and delivery of company's products." You, of course, have been familiar with that paragraph in this agreement?

(Testimony of E. J. Odermatt.)

A. That's right.

Q. And will you state whether or not the terms and conditions in those paragraphs are scrupulously observed and carried out by you?

A. Yes, I took care of the obligations personally. With reference to the plant, the Standard Oil Company owns the buildings and tanks themselves. All the rest——

Q. (Interrupting): But with respect to the expenses and the financial responsibilities and obligations to your employees and other expenses, you have acted in accordance with the provision of this paragraph? A. That's right.

Q. Now I want to read another short paragraph to you out of this agreement: "It is understood and agreed that distributor, in the performance of this agreement, is engaged in an independent business and nothing herein contained shall be construed [20] as reserving to company any right to control the distributor with respect to its physical conduct in the performance of this agreement." May I ask you, Mr. Odermatt, whether, during the life of this agreement, Standard Oil Company of California has made any attempt at all to control you with respect to your physical conduct in the performance of the agreement? A. No, sir.

Q. Now in addition to that, I desire to call your attention to another short paragraph in this agreement, which reads as follows: "Distributor undertakes and agrees that he will, at his own expense, during the terms hereof, maintain full insurance

(Testimony of E. J. Odermatt.)

under any workmen's compensation laws effective in said State covering all persons employed by and working for him in connection with the performance of this agreeemnt, and upon request shall furnish company with satisfactory evidence of the maintenance of such insurance." May I ask you whether or not, during the life of this agreement, under your own expense you have maintained full insurance under any workmen's compensation laws in force in this State?

A. Yes, we carry insurance with the Nevada State Industrial Insurance.

Q. Following that is another paragraph, which reads as follows: "Distributor accepts exclusive liability for all contributions and payroll taxes required under the Federal Social Security Act and State Unemployment Compensation laws to all persons employed by [21] and working for him in connection with the performance of this agreement." During the life of this agreement, Mr. Odermatt, have you acted in accordance with the provisions and conditions of that paragraph? A. I have.

Q. And you have performed the functions and the federal requirements under the Social Security Act and also the State Unemployment Compensation laws, and have at your own expense and effort carried out the provisions of this paragraph?

A. Yes, sir.

Q. Without demanding or expecting from the Standard Oil any compensation therefor?

A. That's right.

(Testimony of E. J. Odermatt.)

Q. I would like to read another paragraph of this agreement: "Distributor shall indemnify and hold company harmless from and against any and all liability of whatever kind and nature for damage to property, including the products and property of company, or for injury or death of any persons arising out of or in any way connected with any act or acts of distributor or distributor's employees under this agreement, or in the operation of any vehicle or vehicles hereunder, provided, however, that in the absence of negligence distributor shall not be held responsible for any loss of or damage to the property and equipment of company caused by fire or other causes beyond distributor's power." You have always understood that paragraph, have you [22] not, Mr. Odermatt? A. Yes, sir.

Q. And recognize it now? A. Yes, sir.

Q. I want to call your attention to another paragraph of this agreement: "Distributor shall secure and maintain, at his own expense, during the term hereof, automobile public liability insurance with limits of not less than twenty-five thousand dollars for injury to any one person, and subject to such limitation not less than fifty thousand dollars for injuries arising out of any one action, and property damage automobile insurance of limit of not less than five thousand dollars. Such insurance shall cover all automobiles, trucks, trailers operated by distributor in the performance of distributor's obligations under this agreement. Distributor shall furnish company with satisfactory evidence of the

(Testimony of E. J. Odermatt.)

maintenance of such insurance." May I ask you, Mr. Odermatt, whether, during the life of this agreement, you have taken out and maintained automobile insurance in accordance with the provisions of this paragraph?

A. Yes, sir, we have carried insurance.

Q. And you are still carrying it?

A. That's right.

Q. And have you given the company satisfactory evidence of this fact? A. Yes, sir. [23]

Mr. Platt: For the moment, your Honor, that is all I desire to read from this agreement.

Q. Mr. Odermatt, is there a difference in the price of gasoline delivered, let us say at Wells, Nevada, than there would be of gasoline delivered at Contact, Nevada? A. That is correct.

Q. That there is a difference in price?

A. That is correct.

Q. Would you mind stating what that differential was at or about the time of this fire in 1947?

A. Two cents a gallon.

Q. At which point was the price the greater?

A. At Contact, Nevada.

Q. You operated from Wells, Nevada?

A. That is correct.

Q. What did you do with this differential in price, that is, the two cents?

A. At that particular time we collected the two cents personally.

Q. In other words, that differential in price, two cents a gallon, was collected by you?

(Testimony of E. J. Odermatt.)

A. That is correct.

Q. And not sent to Standard Oil?

A. That is correct.

Q. And of course that was all done with the approval and consent [24] of Standard Oil?

A. I am not in position to answer that.

Q. Well, in any event they never interposed any objection? A. That is correct.

Q. And for how long a period of time did you continue that?

A. We continued that practice until, I believe it was September, 1949, at which time we entered into a different agreement with the company and we now bill it as an FOB point and they reimburse me for the two cents.

Mr. Platt: I think that is all, your Honor.

(Jury admonished and recess taken at 11:50 a.m.)

Afternoon Session, February 8, 1950, 1:30 P.M.

Presence of the jury stipulated.

Mr. Platt: With the indulgence of the Court and counsel, your Honor, I would like to ask the witness one or two more questions.

The Court: Very well, Mr. Platt. Is there any objection to the introduction of the contract exhibit?

Mr. Daly: Yes, if the Court please, we will object to the offered exhibit upon the grounds that no proper foundation has been laid. There is no showing that the plaintiff in this action had any notice of the circumstances of the contract or the terms of

(Testimony of E. J. Odermatt.)
the contract, and therefore it is not [25] binding upon him.

The Court: Objection will be overruled and the exhibit will be admitted as Defendant Standard Oil's Exhibit A.

Mr. Daly: If the Court please, for the sake of the record, we will also move to strike the testimony given in relation to the exhibit.

The Court: Motion will be denied. Any further cross-examination?

(Mr. Odermatt resumes the witness stand on further examination by Mr. Platt.)

Q. Mr. Odermatt, before the recess I called your attention to the contract and agreement entered into between you and Standard Oil Company of California, particularly with respect to the second paragraph of that agreement, which has since been marked Defendant's Exhibit A. On further examination of this contract, I find another paragraph to which I desire to call your attention, for the benefit of both the Court and the jury, and that paragraph is the third paragraph from the bottom of page 2 of the agreement, and it reads as follows: "It is further understood and agreed that company reserve no right to exercise any control over any of distributor's employees and that all employees of distributor shall be entirely under the control and direction of distributor, who shall be responsible for their actions and commissions." As I understand it, this morning you [26] testified that your

(Testimony of E. J. Odermatt.)

employees were entirely under your control. They were hired by you, that they were paid by you, and that the Standard Oil exercised no control over them at all. Am I correct in what I said?

A. That's right.

Q. May I ask you further as to whether you regulated the hours of employment of your employees? A. Yes, I did.

Q. And if they had vacations, who regulated and controlled them? A. I regulated them.

Q. And these things were all your own responsivility? A. That's correct.

Mr. Platt: I think that is all.

Mr. Halley: Your Honor, I assume at this time it would be our privilege to examine Mr. Odermatt on parts of direct examination?

The Court: Yes sir.

Mr. Halley: However, at this time we will waive it.

The Court: Any further questions?

Redirect Examination

By Mr. Daly:

Q. Who regulated your vacation, Mr. Odermatt?

A. I didn't have any, but if I had had one I would have regulated it myself.

Q. You spoke of this price differential, I believe it was called, delivery price at Contact and Wells, of two cents a gallon, [27] was that on gasoline?

(Testimony of E. J. Odermatt.)

A. That was on gasoline and kerosene and fuel oils.

Q. Now did you collect the full amount, we will say, from Mr. Herzinger there at Mineral Hot Springs, the amount that you collected from him, did that include your hauling charge?

A. That's right.

Q. And you paid your numerous amounts by check, as I understood you to say?

A. That's right.

Q. And those checks were forwarded to San Francisco, is that correct?

A. No, the checks were sent to Salt Lake for the gasoline part of it. For the hauling, those checks were made out to me.

Q. Weren't they frequently made out to the Standard Oil Company? A. For the product.

Q. There was a separation of the two?

A. That's right.

Q. There were a number of questions asked about the payment of various taxes by you or by the Standard Oil Company. I presume the Standard Oil Company paid the real estate taxes on the bulk plant, is that right? A. Yes.

Mr. Platt: Will you clarify that a little further?

Q. When you answered the question, Mr. Odermatt, what did you think was meant by the term "bulk" plant? [28]

A. Real estate property, warehouse, garage, storage tanks.

Q. Warehouse, garage and storage tanks?

A. Yes.

(Testimony of E. J. Odermatt.)

Q. And those, I understand, were owned by the Standard Oil Company? A. That's right.

Q. And the particular bulk plant to which we are both referring I take it also is at Wells?

A. That's right.

Q. The commissions which you received, Mr. Odermatt, were they by check from the company?

A. That's correct.

Q. Were those checks sent by mail?

A. Yes.

Q. How frequently, or when, were they received by you? A. Once each month.

Q. Do you remember, Mr. Odermatt, the deposit stamp you spoke of that was put on the checks before they were sent to Salt Lake City for deposit—was that furnished by the Standard Oil Company?

A. Standard Oil checks?

Q. The stamp, the deposit stamp?

A. Are you referring to Standard Oil checks?

Q. I am referring to checks payable to the Standard Oil. A. Yes.

Q. Plaintiff's Exhibit 3. The stamp I am referring to is the [29] first one that appears on the top at the back.

A. Yes, that was supplied by the Standard Oil.

Q. Is that the only stamp you put on the checks?

A. Yes, that was all on the Standard Oil checks. That was the only endorsement we placed.

Q. Did you have any meetings of distributors throughout this area with representatives of Stand-

(Testimony of E. J. Odermatt.)

ard Oil Company along about May of 1947, or say for a year's period prior to that time?

A. In what connection?

Q. Well, in any connection. Was it a company policy to call the distributors together for meetings?

A. No, not as a wholesale distributor, I don't remember any meetings in that vicinity of time.

Q. Did your association with Standard Oil Company begin with this agreement in August of 1944?

A. No, it did not.

Q. What was your connection with them prior to that time?

A. I had worked prior to that time as an employee.

Q. Where?

A. I started in Reno, worked in Tahoe City, Quincy, Fresno, Wells, Susanville, Ely, Ruth, McGill, Carlin, and Wells.

Q. What were you doing for them?

A. Part of the time I was engaged as a tanker driver. The last few years I worked for them as an employee I was operating a plant, in charge of a bulk plant. [30]

Q. In charge of a bulk plant?

A. That's right.

Q. Is that different than the bulk plant you are talking about at Wells?

A. For the last few years it was the same plant. I worked from 1932, I believe, to '41 in that same plant.

Q. At Wells? A. That's right.

(Testimony of E. J. Odermatt.)

Q. Well, from the time you entered into this contract with Standard Oil Company, which is dated August 26, 1944, did you have any visits from representatives of Standard Oil Company?

A. We had a branch manager that lives in the section that makes visits in the field, yes.

Q. Where is the branch manager that would contact you located? A. In Ely.

Q. Would he come to your bulk plant there, or the Standard Oil bulk plant at Wells and see you?

A. That's right.

Q. And did he discuss with you methods of your operations and the handling of petroleum products?

A. His visits were in line with sales promotion, collection of delinquent accounts that was their responsibility, which had lapsed their time.

Q. Did he keep in pretty close touch with you on those matters?

A. Well, I couldn't tell you exactly how frequent his visits [31] would be. They might be once a month, they might be oftener or over a greater period of time.

Q. Did any representatives of Standard Oil Company ever suggest to you ways of handling the petroleum products and the delivery of the products? A. No, sir, not as a distributor.

Q. You never had any suggestions from any place? A. No sir.

Q. I hand you, Mr. Odermatt, what has been marked Plaintiff's Exhibit 5 for identification, and ask you what it is?

(Testimony of E. J. Odermatt.)

A. It is Sales Operation Manual.

Q. Do you know who it is put out by?

A. By the Standard Oil Company.

Mr. Daly: At this time we offer the Sales Operating Manual in evidence.

Mr. Platt: May I ask a question or two, your Honor?

The Court: Yes sir.

Q. (By Mr. Platt): Mr. Odermatt, did you ever have a copy of this manual?

A. As an employee, yes. At the present time, to my recollection, I do not have one.

Q. How long has it been since you had a copy of this manual?

A. I would be at a loss to say. That one itself is dated 1938. I probably had one in my possession up to '41.

Q. Up to '41? [32] A. Very possible.

Q. As an employee of Standard Oil Company?

A. That is right.

Q. But since you became a distributor, you have never had one of these manuals?

A. Not to my recollection, no. I don't have one in my possession. We have a sub-station manual at our bulk plant which is a fairly large book, but what it contains in complete detail, I couldn't tell you from memory.

Q. Well, so far as the contents of this particular manual may be concerned, you have no knowledge? You don't know what it contains?

Mr. Parry: I object to that as not being in line with the testimony given by the witness.

(Testimony of E. J. Odermatt.)

The Court: That would be a matter for argument.

A. I would say as to the contents of the manual, it is something as an employee would have to definitely refer to.

Q. Do I understand because you are not an employee and because you are a distributor, it isn't of any particular interest to you?

Mr. Parry: I object to that as immaterial, if the Court please, whether of interest to him.

The Court: Maybe you could explain what you mean by interest.

Mr. Platt: Of course, the point I am trying to bring [33] before the Court is this, certainly this particular manual must have been called to the attention of the witness and that is what I am trying to establish, in order to ascertain whether he has any knowledge of its contents.

The Court: Be a little bit more specific on the question of whether it is of interest to him.

(Question read).

The Court: In what way do you mean, Mr. Platt, interest?

Mr. Platt: Let me withdraw the question and ask you this:

Q. Has this particular manual, or one like it, been called to your attention, or has it been sent to you while you were acting in the capacity of a distributor for the Standard Oil? A. No sir.

Q. You say no? A. No sir.

(Testimony of E. J. Odermatt.)

Mr. Platt: Well, your Honor please, we object because it seems quite evident the manual has never been called to the attention to the witness.

Mr. Halley: We join in the objection, your Honor.

The Court: I can't see where it would be material at this time. The objection will be sustained to its admission at this time, without prejudice, of course, to offer it later if it appears then [34] to be in order.

Mr. Daly: We would like to ask one or two more questions.

Q. (By Mr. Daly): I presume you had a manual the same as this in your possession, you say probably up until 1941? A. That is possible.

Q. You have read it, have you not?

A. That's right.

Q. You are familiar with what it is?

A. I couldn't tell you exactly what is in it after this length of time, no.

Q. I call your attention to what is printed there and ask you to whom this book is directed?

Mr. Halley: Before he answers the question, I would like to see the book, your Honor.

The Court: Yes.

Mr. Halley: We will object to the question, your Honor, for the reason that, first, no foundation has been laid or proved for the introduction of the manual itself, or any of its contents; secondly, it refers to matters—the printed matter that counsel

(Testimony of E. J. Odermatt.)

is referring to—refers to matters of which this witness has no knowledge, by his own testimony, by reason of the fact that he stated he did not have that manual as a distributor.

The Court: Objection will be sustained. [35]

Q. You spoke of a sub-station manual, Mr. Odermatt. Do you have one of those with you?

A. No, I don't.

Q. Is this what you are referring to when you say sub-station manual? A. No, it isn't.

Q. Do you have one of these?

A. No, I don't.

Q. Where is your sub-station manual, Mr. Odermatt? A. It is at my plant in Wells.

Q. Weren't you served with a subpoena to bring such a manual with you?

A. I was served with subpoena but on the very last minute and I was stopped on my way through Elko on the way to Reno. I believe that in all fairness to me that the subpoena should have been served before the departure time.

Q. Isn't it a fact that you were served with that subpoena on Monday? A. That is right.

Q. Is that the last minute?

A. I was in Elko on my way to Reno, yes sir.

Mr. Halley: May I ask a few questions, your Honor, at this time?

The Court: If counsel is finished.

Mr. Daly: No, I am not through. [36]

The Court: Do you object?

Mr. Daly: No.

(Testimony of E. J. Odermatt.)

Mr. Halley: The reason I ask this, your Honor, is to show that when Mr. Odermatt was on his way from Wells he had to go through the city of Elko to be here for the purpose of the trial and he was served with this subpoena at that late date when coming from there. I would like to also say that Mr. Odermatt is trying to arrange to get the type of manual they have asked for in their subpoena from one of the local distributors in this area and I think later we can produce it.

Mr. Daly: That was the only question I was going to ask Mr. Odermatt.

The Court: Any further questions?

Recross-Examination

By Mr. Platt:

Q. Mr. Odermatt, you testified, as I understand, to the best of your knowledge Standard Oil Company paid taxes on certain real property or real estate, is that what you said? A. That's right.

Q. Did you mean by that that Standard Oil paid taxes on all real estate it owned in the State of Nevada?

A. I meant it paid real estate taxes on the property at Wells, Nevada. That is the only thing I have any knowledge of.

Q. And that was real property, the title to which was in Standard Oil? [37]

A. Well, I couldn't tell you whether the title of that property—I believe it is railroad ground—they have property that they pay taxes on in Wells.

(Testimony of E. J. Odermatt.)

Q. May I ask you—of course, I assume counsel will admit that under the legal requirements of this State anybody is required to pay taxes on real property which he, or any corporation, may own within the State of Nevada. How do you know of your own knowledge that Standard Oil did pay taxes on real property it owned in the State of Nevada, or Wells or any other part of the State?

A. Well the tax book that is put out by the county assessor.

Q. And you got that information from reading the assessor's reports? A. That's right.

Q. And what you are testifying to, then, was payable alone and solely upon real property which Standard Oil owned in and about Wells?

A. That is right.

Redirect Examination

By Mr. Daly:

Q. This contract, Defendant's Exhibit A, was prepared by the Standard Oil and sent to you, is that not right? A. That's right.

Mr. Daly: Thank you, that is all.

Mr. Platt: No further question.

Mr. Halley: We have no further questions. [38]

MR. ROSS FRED MOSELY

being duly sworn, testified on behalf of the plaintiff as follows:

Direct Examination

By Mr. Parry:

Q. Will you state your full name please?

A. Ross Fred Moseley.

Q. Where do you reside?

A. Contact, Mineral Springs, Nevada.

Q. How long have you resided there?

A. About four years.

Q. And what is your business or occupation there, Mr. Moseley? A. Bar tender, I guess.

Q. At what place? A. Mineral Springs.

Q. Is that the place also called Mineral Hot Springs? A. That's right.

Q. Who is the manager there?

A. Mr. Herzinger.

Q. Where does he reside? A. Buhl.

Q. And when he is not there, who manages the Hot Springs? A. Well, I do.

Q. How much of the time is he there?

A. Well, possibly once a week.

Q. The remainder of the time you are in charge? [39] A. That's right.

Q. Do you recall a period about or around the time of the fire there in May, 1947? A. I do.

Q. Were you there then? A. I was.

Q. What duties were you performing there at that time?

A. I was in charge of the place on that particular day.

(Testimony of Ross Fred Moseley.)

Q. Where is this Mineral Hot Springs located, say with reference to Contact?

A. Well, it is about a mile and a half north.

Q. And on what highway? A. 93.

Q. How are the buildings which are located there situated with reference to the highway?

A. You mean how are they set?

Q. Yes, are they close to the highway or where are they located?

A. They are just off the highway.

Q. Are there some hot springs there?

A. Yes.

Q. How far are the hot springs from the highway? A. Oh, about 300 yards.

Q. Are there some buildings near the hot springs? A. Yes sir. [40]

Q. What buildings are there?

A. Cabins, bath house.

Q. How many cabins in that area?

A. Five cabins.

Q. And also a bath house? A. Five baths.

Q. Were there some more cabins over closer to the highway? A. Yes.

Q. And in May, 1947, how long had you been there, about?

A. Well, a year and a half, I judge.

Q. And during that period of time from who had you procured your gasoline and other petroleum products sold there? A. Mr. Odermatt.

Q. What kind of products were they, what brand?

(Testimony of Ross Fred Moseley.)

A. Gasoline, fuel oil, stove oil.

Q. And made by what company, if you know?

A. Standard Oil.

Q. Was there a service station there?

A. Yes sir.

Q. And some pumps? A. Yes sir.

Q. How many pumps did you have?

A. Two.

Q. Where did you store the gasoline and dispense through the pumps? [41]

A. They were stored in underground tanks.

Q. How many underground tanks were there?

A. Two.

Q. Generally what did the building consist of that was there by the highway. Describe it to me generally first.

Q. Well, it was a frame structure.

Q. Just tell me what rooms were there.

A. Well, had a bar room, grocery store, and a cabin and oil house and pump house and power.

Q. And where was the service station? Was it connected with this building you described?

A. It was right in front of the grocery.

Q. Have you prepared a sketch map which indicates generally the station there and the buildings that were there, Mr. Moseley? A. Yes.

Q. I hand you a plat and will ask you if you know who prepared that? A. I did.

Q. And does it show generally the building as it existed there the day of the fire, the floor plan?

Mr. Platt: If I may be permitted to interrupt?

(Testimony of Ross Fred Moseley.)

The Court: Yes.

Mr. Platt: I suppose the purpose of that plat is to acquaint the jury with the construction of the building and I [42] don't know how that can get to your Honor and the jury unless somebody makes a diagram on the blackboard to make it clear to everybody.

Mr. Parry: I was going to offer this diagram first, Mr. Platt, to see if it would not clear it up.

Mr. Platt: We would have no objection to the witness going to the blackboard.

The Court: If this is a fair representation of the construction there, I can not see where it would be objectionable and then if you want any further illustration, some one can place it on the board.

Q. (By Mr. Parry): Approximately what scale did you use, Mr. Moseley, in making it?

A. Three inches to a foot.

Q. As far as you know, does that represent the relative size of the rooms and their location there?

A. Yes.

Mr. Parry: Now I will show it to counsel and see what they think about it.

Mr. Puccinelli: May we have the Court's indulgence?

The Court: Certainly.

Mr. Parry: At this time then, for the purpose of illustration, we will offer in evidence Plaintiff's Exhibit No. 6, with the idea of going ahead. [43]

Mr. Platt: We have no objection to that, your

(Testimony of Ross Fred Moseley.)

Honor, if it will not be deemed an admission on our part that it is accurate.

The Court: Of course, you will not be precluded from showing later on any inaccuracy, if there is any. It may be admitted in evidence.

Q. Mr. Moseley, I wonder if you will take this map that we have marked Exhibit 6, and I will give you a pencil and will you first mark on there which room was the one that you call the bar room?

A. This lower one.

Q. Will you write that in your handwriting some place in there? (Witness complies.) Now what are the directions on the map as you hold it?

A. Well, this is facing west, this is north, this is east, and this is south.

Q. And talking among associate counsel, it is suggested, as they recall it, the scale was one-eighth of an inch to a foot. Does that coincide with your memory? A. Well, that is more like it.

Q. And toward the top of the map, as I am now holding it, I notice the word "canopy," is that the service station part of the building?

A. That is the canopy in front of the roof.

Q. Is that so cars could drive in? [44]

A. Yes.

Q. Those two red circles near the top are what?

A. They represent pumps.

Q. As the plat now stands, it doesn't show any doors and windows? A. No.

(Exhibit passed to the jury.)

(Testimony of Ross Fred Moseley.)

Mr. Parry: The suggestion has been made, your Honor, we might save time if we take a short recess and have the witness transfer this to the blackboard.

The Court: Couldn't we proceed with some other witness while he is drawing that?

Mr. Parr: I think probably we will have to assist him somewhat in doing it, so it will be a little difficult to proceed.

The Court: We will take a recess for about ten minutes. Jury admonished and recess taken at 2:10 p. m.

2:30 P. M.

Presence of the jury stipulated.

Mr. Moseley resumes the witness stand on further

Direct Examination

By Mr. Parry:

Q. Mr. Moseley, when gasoline was delivered to the place there at Mineral Hot Springs, where did they haul it from?

A. From Wells, Nevada. [45] ?

Q. Were there any hills in between Wells and Mineral Hot Springs, or grades?

A. Yes, there are several.

Q. And this day, May 3, 1947, what kind of a day was that? A. Pretty warm.

Q. How warm was it, if you know?

A. Well, I judge about 90 in the shade.

Q. And do you recall Mr. Nielson arriving there with a load of gasoline? A. I do.

(Testimony of Ross Fred Moseley.)

Q. What was their usual custom when they brought gasoline for delivery? What did they do when they got there?

Mr. Platt: I object to the custom. If the witness has knowledge of what Mr. Nielson did when he delivered the gasoline, that is competent testimony.

The Court: Can you lay a little better foundation?

Mr. Parry: Yes.

Q. Do you know how Mr. Nielson delivered gasoline when he came there each time?

A. How he delivered it?

Q. Yes, answer yes or no. Do you know what procedure he followed? A. No.

Q. Did you watch him this particular day?

A. No. [46]

Q. Then will you step down to the map that you prepared on the blackboard, please, Mr. Moseley. Starting with the diagram closest to yourself, what is the room that you have drawn first on the blackboard, Mr. Moseley?

A. This is called the bar room.

Q. Have you put some figures on there, numbers?

A. Yes sir.

Q. What do they indicate?

A. That is the dimensions of the building.

Q. Are those the inside or outside dimensions, if you know? A. The outside.

Q. And what was the size of that room we call the bar room? What are the dimensions?

A. Twenty-four by sixty.

(Testimony of Ross Fred Moseley.)

Q. And then what is the direction closest to yourself, what direction is that? A. That is south.

Q. And then as you go north, what is the next room there? A. That is the grocery store.

Q. What was the size of the grocery store?

A. Sixteen by twenty-four.

Q. And then is there a room east of the grocery store? A. That is a back porch.

Q. What was the size of it?

A. Eight by twenty-four. [47]

Q. Was there a door between the bar and the grocery store? A. Yes.

Q. Have you shown that on your map?

A. No, I have not.

Q. I wonder if you would take an eraser and chalk and fix that store and show where the bar was. Is that line supposed to be solid from there on down below the door? A. Yes.

Q. Let us draw that a little heavier so we can see it. Above the door is that line solid to up to the front wall? A. That's right.

Q. There is one door then from the bar room into the grocery room? A. Yes sir.

Q. About how wide was that door?

A. About 2.8 by 6.8.

Q. What do you mean by that?

A. That is the size of the door.

Q. Two feet eight inches by six feet eight inches, is that right?

A. Two-eight wide, six-eight long.

Q. Now was there a front door in the bar room?

(Testimony of Ross Fred Moseley.)

A. Yes.

Q. I wonder if you would show us where that was please. (Witness indicates.) Now were there some windows in the front [48] of the bar?

A. Two.

Q. By a couple of "x's," would you show us on each side where the windows were? How wide were those windows? Show us how wide they were by an "x" on each side. (Witness complies.)

A. They would be approximately four by eight, four feet wide and eight feet high.

Q. Now there was a door from the grocery store out into the front? A. Yes, sir.

Q. Will you show us where that was? (Witness indicates.) Were there windows in the front of the grocery store? A. Yes, there were two.

Q. Show those with "x's," one on each side, please. How large are those windows?

A. Well, they are about the same size as the bar room windows.

Q. Have you shown the gasoline pumps on your map? A. Yes sir.

Q. How have you shown those?

A. Right here.

Q. By two circles near the top. Now what extended from the grocery store front wall out to the pumps?

A. A canopy in front of the grocery store. [49]

Q. What held the canopy up out towards the pumps?

(Testimony of Ross Fred Moseley.)

A. Those two upright pipes, one here and one here.

Q. That is the corner?

A. That is each corner.

Q. That is the gasoline station canopy so cars could drive in under? A. That is right.

Q. What did the pumps set on?

A. Concrete base.

Q. A concrete island there for the pumps?

A. Yes.

Q. Going back to the bar room, were there any windows on the side wall of the bar room?

A. No.

Q. This day in question was the front door of the bar room open? A. It was.

Q. Was the front door of the grocery store open?

A. Yes.

Q. Was the door between the bar room and the grocery open? A. Yes.

Q. Immediately north of the bar room you have another building there marked. What is that building? A. That is a cabin.

Q. What is the size of it? [50]

A. Twelve by twelve.

Q. Was there any one in that that day, that you know? A. Yes.

Q. Who was in there?

A. There was one night man in there.

Q. Do you know his name? A. Yes.

Q. What is his name?

A. His name was Jim, I believe.

(Testimony of Ross Fred Moseley.)

Q. And was there some space between the grocery store and the cabin? A. Yes.

Q. About how much?

A. About a foot between the grocery store and the cabin.

Q. And then the next building to the north was what? A. That was the oil house.

Q. Was there a space between those two buildings? A. About the same distance.

Q. On there north what is the building you have over there? A. A pump house.

Q. What kind of pump did you have in there?

A. Pressure.

Q. To pump water? A. Yes.

Q. Did you have a water system? [51]

A. Yes.

Q. Were there some cabins around that area that you have not shown on the blackboard?

A. There were two cabins sitting back here just beyond the grocery store.

Q. What are the dimensions of the cabins there, the one up by the grocery store? A. This one?

Q. Yes. A. Twelve by twelve.

Q. And what were the dimensions of the oil house? A. Fourteen by twenty-four.

Q. And the pump house? A. Ten by ten.

Q. How many places were there to fill underground tanks? A. Two.

Q. Can you indicate where those two places were, where they filled the underground tanks? Mark a small circle on your plat. (Witness complies.) One

(Testimony of Ross Fred Moseley.)

of them is on the west wall of the grocery store and north of the door and in front of the window, is that correct? A. Yes.

Q. And the other is between the two gasoline tanks? A. Yes.

Q. When Mr. Nielson came to your place there the day of the [52] fire, where were you?

A. I was inside the bar room.

Q. Who, if any one, was in there with you?

A. Mr. Klitz and Mr. Nielson and myself.

Q. Now when Mr. Nielson drove up, what time of day did he arrive?

A. Oh, about one o'clock.

Q. And where did he drive first when he came up? A. He drove to this tank here.

Q. This one closest to the grocery store?

A. That's right.

Mr. Platt: May I inquire if the witness saw Mr. Nielson drive up?

The Court: Yes sir.

Q. (By Mr. Platt): Did you see Mr. Nielson drive up?

A. I wouldn't say that I saw him drive up. My first recollection when he drove up he was filling the tank.

Mr. Daly: Is that the tank there under the canopy? A. Yes.

Mr. Platt: You Honor, of course we would not interpose any objection to testimony that the witness has based upon his direct knowledge, but I understand him to say that he did not see Mr. Niel-

(Testimony of Ross Fred Moseley.)

son drive up. If he saw him, that is another thing, I think his testimony would be competent, but if he didn't see him, then his testimony is guess work. [53]

Mr. Parry: Possibly I can ask a question to clear it up.

Mr. Halley: For the purpose of the record, your Honor, may the witness' answers concerning Mr. Nielson driving up to the place he has indicated be stricken for the time being? If he hasn't knowledge of the fact Mr. Nielson drove up——

The Court: We will let that stand.

Q. (By Mr Parry): Where did you first see Mr. Nielson's truck?

A. In front of the building, in front of the grocery store.

Q. What was he doing there at the truck when you first saw him?

A. Apparently delivering gas.

Q. Did he come in and ask you any questions first? A. No.

Q. Was that his custom, just to come in and start emptying gas into the tanks?

A. That was his custom.

Q. For how long had he followed that custom, if you know?

A. All the time he was on the route while I was there.

Q. Then did he start delivering gas into the filler pipe there at the west wall of the grocery store?

A. That was where he first put it.

(Testimony of Ross Fred Moseley.)

Q. While he was delivering that gas, what did Mr. Nielson do? A. He was in the building.

Q. What part of the building? [54]

A. The bar room.

Q. Did you talk with him any? A. Yes.

Q. Do you remember what your conversation was?

Mr. Puccinelli: Objected to as not responsive. He can answer yes or no.

The Court: He evidently would answer yes. He might as well go ahead.

Q. Proceed. What did you do there with Mr. Nielson?

A. We didn't have any conversation outside I sold him a drink, a soft drink.

Q. Did he drink the soft drink there?

A. Well, I presume.

Mr. Halley: May I suggest if the witness does not know he say so, rather than presume. He has used the phrase twice.

The Court: I think the best thing to do is to let the witness testify and then you can clear up any questions on cross-examination.

Q. Then what did Mr. Neilson do next?

A. He was still in the building.

Q. And about how long did he stay in the building there that first time?

A. Well, I wouldn't say exact because I don't know.

Q. Can you give us any estimate? [55]

A. I would say maybe 15 or 20 minutes.

(Testimony of Ross Fred Moseley.)

Q. Then what did he do?

A. We went outside and moved his truck over to the other tank.

Q. And where did he move his truck then that next time? A. What is the question?

Q. Where did he move his truck to?

A. He moved it over to the other tank.

Q. I wonder if you would come down to the blackboard and take that blue chalk and show us where he moved his truck to.

A. Then he pulled his truck down to this point.

Q. Draw his truck in there, just roughly. (Witness complies.) Tell us which way it was headed. That is west of the pump, is that right?

A. It was on the west side of the pumps.

Q. Then what did he do after he moved his truck over there? A. Came back to the building.

Q. Had he started to deliver gas?

A. I presume.

Mr. Halley: Just a second. I move that go out.

The Court: Maybe we ought to find out whether he knows or not.

Q. Did you look outside there?

A. Yes, I looked out.

Q. Did you see the truck?

A. The truck was out there. [56]

Mr. Platt: Your Honor, I must interpose an objection to these leading questions.

The Court: Well, I think under the circumstances we may be wanting one or two of them. Objection will be overruled.

(Testimony of Ross Fred Moseley.)

Q. What did you see happening out there at the truck? A. Nothing.

Q. What do you mean by nothing?

A. There was nobody around the truck.

Q. Where was Mr. Nielson?

A. In the bar room.

Q. Did you see the hose leading from the truck anywhere?

A. Not at that particular moment.

Q. Well, at any time did you?

A. No, I didn't.

Q. Then after Mr. Nielson moved the truck, did he go back into the bar room again? A. Yes.

Q. How soon after he moved the truck?

A. Well, about a minute after.

Q. Right immediately afterwards?

A. Yes sir.

Q. And then what did he do when he came in the bar room? A. Well, amused himself.

Q. How? [57]

A. Well, there was a picture machine in the rear end of the building.

Q. What kind of a picture machine was it?

A. A moving picture.

Q. How does it operate?

A. Well, it is run by electricity, moving machine.

Q. What did it take to start it operating? What made it go?

A. You had to put some coins in to get it in operation.

(Testimony of Ross Fred Moseley.)

Q. Did Mr. Nielson put any coins in it?

A. Yes.

Q. Do you know how many?

A. No, I don't.

Q. Would you step down again and show the jury where the moving machine was? Draw a small square there. A. Right here.

Q. Now where was Mr. Nielson while he was looking at the pictures?

A. Well, right in about the center of the building, sitting on a stool.

Q. About how far back from the machine?

A. Well, thirty-five feet.

Q. How many feet? A. Thirty-five feet.

Q. Now draw a circle with an "x" there where he was. Now was Mr. Klitz around there some place? [58] A. He was in the building.

Q. Where was he from the moving machine?

A. He was right here at the machine.

Q. Draw an "x" and circle where Mr. Klitz was. (Witness complies.) Now were there any counters or bars in that room?

A. Yes, there was counters along this.

Q. Take some white chalk and draw where they were. (Witness complies.)

A. This is the bar.

Q. Put a "B" there.

A. This is the lunch counter.

Q. Put an "L" there. Now where were you standing just before this fire?

A. Well, I was right here.

(Testimony of Ross Fred Moseley.)

Q. Take this blue chalk and put an "x" and circle the "x" where you were. Were you in the building or outside the building?

A. I was in the building. I wasn't long getting out. It didn't take me long to get out.

Q. At that time were there any open flames of any kind in the bar room, stoves or anything of that sort? A. Nothing in opeartion.

Q. Anything in operation at the grocery store?

A. No.

Q. Where were you standing when you first saw this fire? [59] A. Right here.

Q. Could you see outside? A. Yes.

Q. And through what could you see outside?

A. Through these windows.

Q. That would be the most southerly window on the west wall of the grocery store?

A. That's right.

Q. What did you see? Tell the jury exactly what you saw there. A. I saw the truck.

Q. When the fire started, what did you see?

A. Saw the fire.

Q. Where did you see the fire?

A. Right under the truck.

Q. Take the pointer there where you saw the flash of fire.

A. Well, it would be right in there, the rear part of the truck.

Q. That is near the most southerly pump?

A. Near this pump.

Q. How much of a flash of fire did you see?

(Testimony of Ross Fred Moseley.)

A. Well, it extended.

Q. An extension? A. That's right.

Q. Of what extension with reference to the canopy there?

A. The truck was outside the canopy, direct to the corner of the building. [60]

Q. Where did the flash, the flame, go that it came from? A. Up under the canopy.

Q. How much flame and fire was there there?

A. How much flame and fire?

Q. Yes. A. All flame and fire.

Q. What did you do when you saw that flash out there?

A. I got out of there as quick as I could.

Q. How did you go out?

A. Out the front door.

Q. That is the door you have drawn on the diagram? A. That's right.

Q. What did Mr. Nielson do.

A. He went out too.

Q. What door did he go out?

A. The same one I did.

Q. Which one of you went out first?

A. That was about a tie.

Q. Was there any flame in the doorway when you went out? A. Yes, it was coming in.

Q. Was there any flame inside the building when you went out? A. No.

Q. Where was the flame, inside or outside.

A. It was outside.

(Testimony of Ross Fred Moseley.)

Q. Did you get burned as you went through the door? [61] A. No.

Q. What kind of clothes did you have on?

A. Didn't have many on.

Q. Did you have a coat on? A. No.

Q. Did you have a shirt on? A. No.

Q. Did you have your sleeves rolled up?

A. No.

Q. Were you wearing the same beard and whiskers you are wearing now? A. Yes.

Q. Did you get your eyebrows or beard singed in going out of the door? A. No.

Q. What direction was the wind blowing, if you know? A. Coming southwest.

Q. Coming from the southwest?

A. That's right.

Q. What did you do when you got outside there?

A. Oh, nothing I could do.

Q. Did you see Mr. Klitz go out? A. No.

Q. Was there any one else in the barroom there?

A. Yes, I believe there was another fellow in there. [62]

A. And did you see him come out? A. No.

Q. What did Mr. Nielson do after he got out? What did you see him do first?

A. Well, he got in that truck as soon as he could.

Q. How soon did he get in it?

A. Just a matter of seconds.

Q. Did he go to the side or back of the truck before he got in?

(Testimony of Ross Fred Moseley.)

A. Well, it appeared to me he went to the rear of the truck.

Q. Went where?

A. To the rear end before he went to the cab?

Q. What did he do at the rear end, do you know?

A. Well, I wouldn't know.

Q. Did you see him make any motions?

A. He was making some pretty fast.

Q. Did he make any motions with his hands?

A. Yes.

Q. Can you show the jury how he did or how he moved his hands back there?

A. Just like anybody fighting fire, holding something hot.

Q. Did he try to fight the fire there at the back of the truck? A. Not apparently.

Q. What did he do?

A. It appeared to me he was taking the hose off the truck. [63]

Q. Then what did he do after that?

A. Went in the cab and got the truck out of the way.

Q. How soon did the truck start after he got in the cab? A. Right now.

Q. Which direction did he drive?

A. North.

Q. That would be toward the right-hand side of that road as you look at it? A. Yes.

Q. Did you see the truck drive away.

A. I did.

Q. Was there any fire around the truck?

(Testimony of Ross Fred Moseley.)

A. It was all afire.

Q. And did it leave anything behind it as it drove away? A. Rubber tracks.

Q. Did any fire spill out of the truck when it drove away? A. The truck was all afire.

Q. Was there any gasoline spilling out of the truck? A. No sir.

Q. Was there anything burning spilling out?

A. No. The truck was burning.

Q. The whole thing was burning?

A. The truck was afire.

Q. Any fire dragging on the ground as it drove along?

A. Burning. You couldn't tell with the wind blowing. [64]

Q. The wind was blowing pretty hard there?

A. Yes.

Mr. Halley: I move that go out. The witness is guessing and speculating apparently. It is not responsive to the question if he doesn't know.

The Court: I think the answer will stand. You can bring it out on cross-examination.

Q. Were the tires on fire, do you know?

A. I couldn't say as to that.

Q. Now then while he was driving the truck away, what did you do then?

A. I just got back there where I wouldn't get burned up and watched it burn.

Q. Did it burn very rapidly or slowly?

A. It burned very rapidly.

Q. Were you able to get anything out of the building? A. Not a thing.

(Testimony of Ross Fred Moseley.)

Q. Was there any money there in the building?

A. Yes.

Q. How much money was in there in different places, in different departments, if you know?

A. You mean the total amount?

Q. Well, let us take that step by step. Tell me one place where you had some money first.

A. Well, had two registers in the bar room. [65]

Q. Approximately how much money was in there, if you know?

A. About three hundred dollars in the bar register, about seventy-five in the grocery register.

Q. Did you have any money any other place?

A. Yes, we had cash box that we call drop-in money.

Q. What part of the room was it in?

A. That was under the counter, under the lunch counter.

Q. And how much was there?

A. About eight hundred dollars.

Q. Where else did you have any money there?

A. We had a box called the slot box.

Q. Where was that?

A. It was under the lunch counter.

Q. How much was in it?

A. Well, approximately a thousand dollars.

Q. Was this cash either silver or currency you were telling me about?

A. It was silver and currency.

Q. Were you able to get in and get any of the money out? A. No.

(Testimony of Ross Fred Moseley.)

Q. Did you have any checks in there in addition to that? A. Yes, we had some checks.

Q. What kind of checks were they, do you know?

A. Well, they were personal checks and some company checks.

Q. What company? [66]

A. Checks on the U. C. Land and Cattle Company.

Q. Did the U. C. Land and Cattle Company have their headquarters nearby?

A. About eight miles.

Q. What do you call the place where they had their headquarters?

A. Well, they call that San Juan.

Q. Did their men come over to your place much?

A. Quite frequently.

Q. Did they cash check over there?

A. Yes.

Q. What other kind of checks did you have on hand, if you know?

A. Oh, had some government checks.

Q. And do you know the amount of the checks that you had there? A. Oh just approximately.

Q. How much?

A. Approximately a thousand dollars in checks.

Q. Did you have any list of those checks after the fire?

A. Not after the fire. We did have before.

Q. Did you make any attempt to go in the building at all after you got out? A. No.

Q. Could you get back in?

(Testimony of Ross Fred Moseley.)

A. I could have got back in but I couldn't have got out. [67]

Q. How soon was it a mass of flames, within what time after you saw the first fire?

A. What time of day?

Q. No, how many minutes or seconds was it all on fire?

A. Oh, it was really more seconds than minutes. It was right now.

Q. Was there any flame inside the building at all when you went out the front door?

A. No, not when I went out.

Q. Did you have a car parked around there?

A. Yes.

Q. Where was your car parked?

A. South of the building.

Q. South of which part of the building?

A. You might say on the highway. That is right, I say, about southwest of the bar room.

Q. Step down and just make a couple of "x's" where your car was placed. About how close in feet was it to the building?

A. Well, about three hundred feet possibly.

Q. And what did you do with your car?

A. The building and roof fell in before I started to move it.

Q. Then what did you do?

A. Got in and moved it.

Q. Did your car get hot or catch on fire any?

A. No. [68]

(Testimony of Ross Fred Moseley.)

Q. Did you have occasion to observe which way the wind was blowing the fire and flame?

A. Coming southwest.

Q. Was there much of a wind blowing?

A. Pretty stiff wind.

Q. Then as to the buildings that you have shown on the blackboard, how many of them were consumed by the fire? A. All of them.

Q. Does that include the pump house? Was it burned also? A. Included the pump house.

Q. That would be the bar and grocery and canopy and cabin and oil house and pump house were all consumed? A. That is right.

Q. Were the cabins down to the east there burned? A. No.

Q. After the fire, after Mr. Nielson drove his truck from the road, how long did it continue to burn down there, do you know?

A. They worked there quite a while before they got it out.

Q. Who worked on it, do you know?

A. Well, several of the boys from the company ranch. I think Mr. Zilliox was one of them.

Q. Did Mr. Nielson get burned any there?

A. Apparently, yes.

Q. What did they do with Mr. Nielson? [69]

A. Well, he was taken down to Mr. Ray King's station and they gave him first aid there.

Q. Did you go down with him? A. No, sir.

Q. You stayed there at the place? A. Yes.

(Testimony of Ross Fred Moseley.)

Q. After the fire was over, did you see any remnants of the gasoline hose around there?

A. Yes, sir.

Q. Where did you see the gasoline hose after the fire? A. Well, the hose was destroyed.

Q. What did you see?

A. Well, the wire inside of the hose was laying right alongside the concrete base where the pumps are and the nozzle of the hose was still in the receiving tank.

Q. By receiving tank you mean that filler pipe that goes down to the underground tank?

A. That's right.

Q. Where did you say the nozzle was?

A. In this receiving tank.

Q. Where was the wire that had been in the hose?

A. Laying just like the rubber portion of it had stretched out, the wire and the nozzle.

Q. Was the wire right close to the nozzle?

A. Still connected with it. [70]

Q. Now then, while Mr. Nielson had his truck out there in front, were there any customers either at the service station or in the grocery store?

A. No one.

Q. How long had it been since a customer had been in there before the fire?

A. Well, about 11:30.

Q. Had anybody been there after that time?

A. No.

Q. And over in the gorcery store was there any

(Testimony of Ross Fred Moseley.)

fire or flames or anything burning over there before the fire? A. No.

Q. Was there a refrigerator there in the grocery store? A. Yes, sir.

Q. What kind of refrigerator was it?

A. It was an oil refrigerator.

Q. Was it operating?

A. No, it was not operating.

Q. How long had it been since it had operated?

A. Probably five months.

Q. Where had it been when you were using it when it had been operating?

A. We had it in the bar room.

Q. Why did you move it out?

A. Well, we bought a new electric refrigerator for the bar [71] room.

Q. Then where did you put this oil refrigerator?

A. In the grocery store.

Q. Did you operate it any after it was in the grocery store? A. No.

Q. Was there any sign of any kind on it?

A. "For Sale" sign on it.

Q. In taking the whole area of buildings there, was there any open flame or anything of that sort around there?

A. No, there was no open flame.

Q. Was anything burning that would create a spark. that you know of? A. No.

Q. Did you have a stock of groceries in the store? A. Yes, sir.

(Testimony of Ross Fred Moseley.)

Q. Was the bar and all those rooms, were they all equipped? A. Yes.

Q. That is with the usual furniture and appliances? A. Yes.

Mr. Parry: With the possible exception, your Honor, that we may have to recall Mr. Moseley on some of the items of damages, that is all of him at this time. You may examine him.

Cross-Examination

By Mr. Platt:

Q. Mr. Moseley, are you acquainted with the branch manager of the Standard Oil Company, Mr. William Warner? [72] A. Yes, sir.

Q. And you know he resides in Ely, Nevada?

A. Yes, sir.

Q. You have seen him occasionally, have you, at the place at which you work, Mr. Herzinger's place? A. Yes.

Q. Do you recall having a conversation with him on the 4th day of May, 1947, the day following the fire? A. Yes, he was there at the place.

Q. And do you remember where that conversation took place?

Q. Well, as I recall, I was down in the little cabin below.

Q. And do you recall whether there was any one else present during that conversation?

A. Yes, sir, there was another party with him, but I couldn't recall now what his name was.

(Testimony of Ross Fred Moseley.)

Q. Do you remember whether Mr. Odermatt was present or not?

A. Not at that particular time.

Q. Do you remember any other conversation with Mr. Warner at which Mr. Odermatt was present? I mean a conversation following the fire?

A. You mean that Mr. Warner and I had?

Q. Yes.

A. In Mr. Odermatt's presence?

Q. Yes. A. I never had one. [73]

Q. That is, you do not recall a conversation at which Mr. Odermatt was present, is that it?

A. Well, it all depends——

Q. I mean a conversation following the fire, following May 3, 1947, or after the fire?

Mr. Parry: I think the question has been asked and answered. He said he never had one.

The Court: Let him answer.

A. I don't recall having a conversation with Mr. Odermatt in Mr. Warner's presence before the 3rd.

Q. I want to be fair with you. Is it possible that you did have a conversation with Mr. Warner in the presence of Mr. Odermatt and you just don't recall it?

A. Well, that would be later than the 4th day of May in 1947.

Q. Well, all right—but you do recall a conversation with Mr. Warner on the day following the fire? A. Yes.

Q. Which was May 4, 1947? A. Yes.

(Testimony of Ross Fred Moseley.)

Q. Do you remember at that conversation whether there was another man present by the name of Mr. Hack?

A. Well, there was a man by that name on the premises about that time.

Q. What, if anything, did he do on the premises?

A. Well, nothing in particular. He just had a cabin there and [74] that was his home.

Q. Is it fair to say that he frequented the premises on many occasions because he lived in the neighborhood? A. That's right.

Q. Isn't it a fact, Mr. Moseley, that Mr. Warner, branch manager of Standard Oil, discussed with you as to the cause of the fire?

A. That is not; we never discussed it.

Q. You never discussed it? A. No.

Q. When he came to see you after the fire, the day following, what did you and he talk about?

A. Well, I don't recall—just about bock beer part of the time.

Q. How far is Ely from Contact?

A. Two hundred ninety-three miles.

Q. And Mr. Warner wasn't a daily visitor, was he, at the Herzinger place? A. No.

Q. I understand from your testimony that Mr. Warner came to your place from Ely, or Mr. Herzinger's place, of which you were manager, and all you talked about the day following the fire was about bock beer?

A. That is one thing I remember.

Q. You don't remember anything else? [75]

(Testimony of Ross Fred Moseley.)

A. We didn't discuss the fire.

Q. Are you positive that Mr. Warner never mentioned the fire? A. Yes, he did.

Q. He did?

A. He wanted to know how it got started.

Q. I thought you just said a minute ago that you didn't discuss it at all.

A. I didn't; he was discussing it.

Q. In this discussion, did he talk to you and did you talk to him? A. Yes, I talked to him.

Q. Now, isn't it a fact, Mr. Moseley, that you confirmed a statement made to Mr. Warner by Mr. Hack in which it was said that a gasoline icebox was full of meat in the store and the box was in operation? A. I confirmed that statement?

Q. You confirmed that statement. A. No.

Q. Isn't it a further fact, Mr. Moseley, that upon that occasion you confirmed the statement made by Mr. Hack to Mr. Warner that he first noticed the first roar of flames in the store at the time of the explosion? A. No.

Q. Then as he ran out of the bar room he saw the flames also were all around the station canopy and up high in the canopy [76] ceiling—wasn't that statement confirmed by you? A. No.

Q. You deny that you said to Mr. Warner, in confirmation of Mr. Hack's statement, that the kerosene icebox was full of meat in the store and the box was in operation?

A. I told Mr. Warner that the refrigerator had cured meat in it.

(Testimony of Ross Fred Moseley.)

Q. Oh, you told Mr. Warner that the refrigerator had some meat in it? A. Cured meat.

Q. As a matter of fact, Mr. Moseley, wasn't the box in operation and wasn't there a pilot light burning? A. No, sir.

Q. At the time of the fire? A. No, sir.

Mr. Platt: If your Honor please, I have interrogated the witness along the line for the purpose of laying the foundation for an impeachment. That is all for me at present.

The Court: Any further questions of this witness?

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Moseley, I believe you testified that you had been at Mineral Hot Springs for about four years, is that correct? A. That is right.

Q. Do you recall the date that you went to the Mineral Hot Springs to remain there permanently?

A. You mean permanently?

Q. Yes. A. Well, December of '46.

Q. Approximately six months prior to the date of the fire, is that correct, six or seven months?

A. Well, approximately.

Q. Now I believe you stated further, Mr. Moseley, that your general work or your occupation was that of a bar tender and general manager in the absence of Mr. Herzinger, that is correct, too, isn't it? A. Yes.

Q. And during Mr. Herzinger's absence you had

(Testimony of Ross Fred Moseley.)

absolute charge of the premises? A. Yes, sir.

Q. Now other than yourself, Mr. Moseley, who was employed at Mineral Hot Springs?

A. Beg pardon?

Q. Who worked there beside yourself?

A. Well, at that time there were only two of us, Mr. Traverto and myself.

Q. Where did he live? A. His home?

Q. No, where was he staying at the Hot Springs? Where did he sleep? A. He had a cabin. [78]

Q. Which cabin?

A. This cabin right about here.

Q. This cabin here, is that correct?

A. That is correct.

The Court: Describe it so it will be shown in the record, please, Mr. Puccinelli. You refer to it as "this."

Mr. Puccinelli: Designated as cabin 3, building or structure north, dimensions 12x12.

Q. Now, Mr. Moseley, I wonder if you would step down and on this cabin designated with numbers 12x12 fix any windows or any doors that were in existence on the day of the fire.

A. Well, here is a door, a small window here and a small window in the rear.

Q. Now what work did Mr. Traverto do?

A. He was night man, day man then.

Q. Did he also run your 21 game?

A. Well, he had some at different times. He wasn't a regular dealer.

Q. Who was the regular dealer?

(Testimony of Ross Fred Moseley.)

A. Well, a fellow by the name of Miller and Bartang.

Q. Were they there that day? A. No.

Q. Now for the sake of the jury and the Court, I want you to describe generally the contour of the ground which is to the [79] rear of these buildings.

A. Well, it was on a slope, sloping.

Q. Was it quite a steep slope?

A. Well, about, I would figure about a 40 per cent grade.

Q. Yes, as a matter of fact, from the rear of these buildings going east, there is quite a severe drop, is there not? A. That's right.

Q. Now for the sake of the record, I wonder if you would relate to us where the merchandise that was being stored in and about the premises was actually kept? By that I mean, do you have a basement and store room and if so, where were they located?

A. Well, there was a full basement under the bar room.

Q. How could you enter that?

A. From the rear.

Q. From the outside or inside?

A. Outside.

Q. Could you enter it from the inside?

A. No.

Q. Now I believe you testified, Mr. Moseley, that when you left those premises that you did not go back into the building because you were afraid you couldn't get out, is that correct?

(Testimony of Ross Fred Moseley.)

A. Correct.

Q. Did you go to the basement where merchandise might be stored in the basement? [80]

A. I attempted to.

Q. Did you salvage any of it?

A. Absolutely not.

Q. How long after did you attempt to do it?

A. I would say ten minutes.

Q. This building was 60 feet in length, is that correct? A. Correct.

Q. The fire, you say, started approximately at the point designated, by the corner of the canopy, which is 16 by 16, is that correct? A. Yes.

Q. Do you want this Court and jury to believe in the matter of ten minutes flames had spread over the entire premises, where it prevented you going to the rear of this building and taking merchandise out of this building? A. That's right.

Q. And that is as true as everything you testified to today?

A. That is the truth. It spread that fast.

Q. Now you have designated, Mr. Moseley, the center circle which has been placed by you immediately between what you have indicated as the two pumps, and the zero mark to the north of the store door is the place where you believe the underground storage tank was? A. Yes.

Q. As a matter of fact, isn't this hole by which you fill that [81] storage tank on this side of this door, on the south side?

A. It was on the north side.

(Testimony of Ross Fred Moseley.)

Q. Directing your attention to the third day of May, 1947, where was the opening to the underground storage tank, which is immediately next to the grocery store, to the north of the door or to the south of the door?

A. I would say north of the door.

Q. And that is your best recollection?

A. That is my recollection.

Q. And your recollection in that respect is as clear as your recollection to all of the other facts you have testified to?

The Court: I think it is for the jury, Mr. Puccinelli, to pass on the credibility of the testimony, not the witness himself.

Mr. Puccinelli: Very well, sir.

Q. Now are there any vents there near the area of the opening, by which you fill the underground storage tanks? A. There was then at the time.

Q. Describe the vent which was built there or constructed there with reference to the storage tank to the extreme west of the cabin that is between the pumps. What was it? Where did it go, the vent to permit the escape of fumes?

A. Well, I tell you, we didn't pay much attention to this. The Standard Oil took care of those things, kept the pumps in repair and looked after the tanks. [82]

Q. Who constructed the vents, the Standard Oil?

A. Well, I imagine they did. I wasn't there when they did put them in, but I was there when they put these others in.

(Testimony of Ross Fred Moseley.)

Q. Do you know who constructed the vents?

A. No.

Q. Is this correct, that the vent which was constructed in connection with this outside under storage tank was a pipe which extended upward to a place immediately underneath the canopy?

A. It should have been.

Q. I will ask you to state whether or not the vent which was used in connection with the underground storage tank immediately next to the building was built at ground level?

A. I didn't see.

Q. Did you see any vents during the four years you have been there, or six or seven months prior to this date, did you see anything in connection with the opening of that underground storage tank?

A. No, I never did.

Q. Now I will ask you to state, Mr. Moseley, whether or not there was a trailer house near the premises? A. There was.

Q. Would you please step down from the stand and designate the approximate location of this trailer house? (Witness complies.)

A. It has got to be down in here. This is as near as I can [83] recollect.

Q. Would you mark it with a "T"? (Witness complies.) Did the trailer house burn as a result of this fire? A. It burned.

Q. Do you recall having a conversation with Ray Ward on that date? A. Yes, sir.

(Testimony of Ross Fred Moseley.)

Q. I will ask you to state if it isn't a fact that when Ray Ward made an offer to help you save the trailer house that you said, "Let it burn?"

A. I don't recall that.

Q. Do you recall having a conversation with a Mr. Whitney? A. I do.

Q. Mr. Elmer Whitney?

A. No, I don't recall that.

Q. I will ask you to state whether or not you ever told any one, when discussing the cause of the fire, that you thought it had been ignited by defective electric wiring, or any other cause?

A. I never made that statement.

Q. While we are on the subject of wiring, would you describe generally the wiring in and about the premises of the bar room, store and cabins?

A. Do you want me to mark it on the map?

Q. Can you? [84]

A. Do you want me to draw a map from the power house to the buildings?

Q. Yes, showing generally the lighting system.

A. A line where the wires run?

Q. A line would be all right, indicating the circuit. If more than one circuit, indicate the number of circuits, where they started from, the general wiring. A. All right. (Witness draws.)

Mr. Platt: As to the clarification, your Honor, may I ask the witness a question or two with respect to this?

The Court: Yes.

Q. (By Mr. Platt): Mr. Moseley, as a matter of fact, the so-called electrical equipment here was

(Testimony of Ross Fred Moseley.)

a private affair, wasn't it? A. That is right.

Q. Operated through what they call a Delco system? A. Yes.

Q. And it wasn't a system that was connected on a general pumping utility circuit? A. No.

Q. In your diagraming on the plat, among other things you will indicate just where this Delco system started? Where it was located? (Witness draws.)

A. Well, I will have to go over here somewhere. This line goes this way and this takes off here and hits the bar room [85] on the north side. From the bar room it is connected up to this line and comes here and ran behind off in here. This took off the main line and went up to the bar room on the north side.

Q. (By Mr. Puccinelli): In other words, Mr. Moseley, the main source of the electrical power was a Delco plant located at the small circle in the direction you have just made, is that correct?

A. That is about right.

Q. A straight line coming directly from there to a circuit, which went around the cabin and into the store?

A. Well, the main line went from the power house to the grocery store.

Q. In other words, the main line was this line going from the power house to the grocery store?

A. That is right.

Q. And then it took off at a point into the bar room and then it took off this main line into another line into the cabin designated 12 by 12?

A. Right.

(Testimony of Ross Fred Moseley.)

Q. And you took off another point into the structure you name as the oil house?

A. That is right.

Q. Now the lighting of the cabin, describe that.

A. Well, there were wires—that goes all around the edge of it—and there were lights up on top on poles above the cabin.

Q. Now was that wire insulated? [86]

A. Sure.

Q. Was the insulated wire itself contained inside any protective covering? That is, was the insulated wire nailed up or attached to the canopy, or was the insulated wire inside a metal tube?

A. Well, there was nothing inside—I don't know whether you call it rubber—it had a covering on it.

Q. Now the wiring underneath the cabin, had any part of that wiring system ever been spliced?

A. Well, I couldn't say as to that.

Q. To your knowledge?

A. To my knowledge it wasn't.

Q. How did you turn the canopy lights on and off?

A. Had a switch on the inside of the building.

Q. To your knowledge had that power plant or wiring ever caused you any trouble during the time you were there as manager?

A. Never did.

Q. And it always worked in perfect order?

A. The system did, yes.

Q. Well, did you ever have occasion to make any splices any place in the wiring system?

(Testimony of Ross Fred Moseley.)

A. Well, I haven't done it. I wasn't an electrician. When I needed that work done I called an electrician.

Q. Did you ever call an electrician?

A. Called somebody when necessary. [87]

Q. Who did you call?

A. Well, different fellows. Dale Klitz came over at different times. He did most of the work for us. That's all I know anything about.

Q. Do you know whether or not Francis Harmer ever did any work there?

A. Well, he might have. I don't think he ever did while I was there.

Q. Now I believe you stated the day in question was a warm day? A. That's right.

Q. I believe you testified as best you could remember it was about 90 degrees?

A. Yes, that is right, I believe it was.

Q. I believe you testified further that this day the door was open, the door leading into the bar room? A. That is right.

Q. The door going from the bar room into the grocery store was open? A. Yes.

Q. The door from the outside into the grocery store was open?

A. All open, to my knowledge.

Q. Were the windows open? A. No.

Q. I believe you testified that there was a very—I don't [88] know how you expressed it—either a severe wind or a hard wind, is that right?

A. I would call it a hard wind.

(Testimony of Ross Fred Moseley.)

Q. Now what time did Mr. Nielson come to your place that afternoon or that day?

A. Well, I judge between twelve and 1:30.

Q. At the time that he arrived there who, if any one else, was in the bar room?

A. Well, there was myself and Bill Klitz, and I believe that was all.

Q. I will ask you to state if Bill Hack was in the bar room? A. He had been.

Q. Do you recall him sitting in the bar room when M. Nielson was there?

A. He might have been.

Q. Now when you come from Elko going to the Hot Springs, you are traveling in approximately what direction? A. North.

Q. And when you come from Wells to the Mineral Hot Springs, what direction are you traveling, approximately? A. Coming from Wells?

Q. From Wells to the Mineral Hot Springs?

A. That is north.

Q. From Wells traveling to the Mineral Hot Springs necessitates traveling in what direction?

A. North.

Q. On Highway 93? A. That's right.

Q. Therefore, driving from Wells to the Mineral Hot Springs you would approach it from this direction, would you not, the direction indicated by my pencil, which is moving from south to north?

A. That is right.

Q. Now when Mr. Nielson first came there—

(Testimony of Ross Fred Moseley.)

or when did you first realize that Mr. Nielson was there?

A. Well, when he drove up in front of the building.

Q. Now I ask you to state if he drove in from the south going north?

A. He drove in from the south.

Q. The front of his car was headed in a general northerly direction?

A. I didn't get your question.

Q. So that the front of his car was going in a northerly direction? A. That is right.

Q. Was there any other car under that canopy?

A. Yes.

Q. Whose car?

A. Mr. Klitz had a car sitting there with oil on it.

Q. Here by the oil house? [90]

A. Yes, sir.

Q. I will task you to state whether it isn't a fact that Mr. Klitz had his automobile parked partially underneath that canopy?

A. Well, that could be possible. That is my guess, it was close to the oil house, closer to the oil house than the canopy.

Q. Therefore, your testimony is to the effect Mr. Klitz' car was not parked partially under the canopy.

A. It was very close, but as I said, I couldn't state.

Q. Will you show on the blackboard, to the best

(Testimony of Ross Fred Moseley.)

of your ability, where, in your opinion, that automobile was parked belonging to Mr. Klitz?

A. I will probably get the wrong place.

Q. Will you designate that as "Car" or some other designation? What kind of a car was it, if you know? A. It was a Ford pick-up.

Q. What model?

A. Well, I guess '30 model.

Q. You had to crank it to start it, did you?

A. I don't know, I didn't start it.

Q. Have you ever seen it?

A. No—what is the question?

Q. I asked you if you ever seen the car. Did you say no? A. Oh yes, I saw the car.

Q. You don't know how you start it, whether with self-starter or [91] a crank?

A. Well, I imagine a self-starter.

Q. When Mr. Nielson stopped his truck, I believe you testified he started to fill the underground storage tank which is immediately next to the store?

A. Yes, that is the one he filled first.

Q. Where were you at the time?

A. I was inside the bar room.

Q. Now where in the bar room were you?

A. Oh, I was all over the time he was in there, I was in different places.

Q. You were able, from your position in the bar room, to see Mr. Nielson begin filling the storage tank immediately next to the store, is that correct?

A. Well, I didn't know if he was filling. I saw him drive up there. I just seen him drive up there.

(Testimony of Ross Fred Moseley.)

Q. As a matter of fact, then, when you testified that you saw him fill the underground tank which is next to the store, that is something which you are assuming and something which you do not know of your own knowledge, isn't that a fact?

A. Well, if I say I saw him fill it, I saw him drive up, but I didn't see him fill the tank.

Q. So when you testified on direct examination what he did was to fill that tank, you were simply assuming or guessing?

A. Well, that was the one he filled first. [92]

Q. Did you see him fill it?

A. No, but he evidently did or he wouldn't go to work on the other tank.

Q. Do you know that he filled it? A. No.

Q. Now when he came into your place, I will ask you to state whether or not you know, of your own knowledge, that he was removing gasoline from his truck and putting it into that underground storage tank? A. Did I know that he was?

Q. Yes.

A. That was the reason for him being there.

Q. I repeat my question. Do you know, of your own knowledge, whether or not he was removing gasoline from his truck to that underground storage tank at the time he walked into the saloon, the first time?

A. I couldn't see any gas line, but I presume that was what was going on.

Q. As a matter of fact, your testimony is predicated primarily on presumption, isn't it, Mr. Mose-

(Testimony of Ross Fred Moseley.)

ley? Now, Mr. Moseley, relate, to the best of your recollection, just exactly what he did when he came into the bar.

A. Well, he bought a drink, soft drink, and he put some coins in the picture machine, brought a stool off and watched the pictures. [93]

Q. How long did he remain there?

A. Until he saw that fire.

Q. It is your testimony now that he noticed the fire while the truck was filling this tank?

A. Beg pardon?

Q. Is it your testimony that he observed the fire while he was in the act of filling the underground storage tank immediately next to the store?

A. Go ahead and ask me that question again.

Q. I believe you testified, Mr. Moseley, when he parked his truck underneath the canopy next to the store, that he came into the bar room, the saloon?

A. That is right.

Q. That he put a coin in this juke box, moving picture machine? A. That is right.

Q. Took the stool and put it on the floor, in the middle of the floor? A. That is right.

Q. Sat down and watched the movie, is that right? A. Yes.

Q. How long did he remain there?

A. Well, until he went out and changed his truck.

Q. How long was that, to the best of your recollection? A. Oh, about 15 minutes.

(Testimony of Ross Fred Moseley.)

Q. Now when he went out and moved the truck, where did he move [94] it to?

A. To the other tank.

Q. Whose position you have designated?

A. That is right.

Q. In other words, he moved his truck from its position under the canopy to a position outside the canopy. How did he move his truck, did he back up or go around?

A. I couldn't say as to that. I wasn't observing him that closely.

Q. Did you see him move his truck?

A. I saw the truck moving.

Q. Was he going backward or forward?

A. Well, I wouldn't say whether he backed up or whether he drove around. Anyway, he got over to that tank.

Q. That is when he started filling the underground storage tank? A. That is right.

Q. The location of which is approximately between the two pumps, is that correct? A. Yes.

Q. Now I want you to describe to this jury and the Court, if you can, the type of tank which was on the truck and from which Mr. Nielson was delivering gas.

A. He had three storage tanks on his truck, three compartments. It was a Ford truck. [95]

Q. What kind of a bed did it have?

A. Oh, just an ordinary truck bed with all these tanks, tanks built on it.

Q. Commonly known as a flat rack?

(Testimony of Ross Fred Moseley.)

A. Yes.

Q. Made of wood? A. I presume.

Q. Do you know, Mr. Moseley, from which of the three tanks he was delivering gas when he began to fill this outside underground storage tank?

A. No, I don't know.

Q. In that connection, Mr. Moseley, I will ask you to state where the connection is to which the hose is attached, so as to permit the flow of gasoline from the tank on the truck into the underground storage tank, the end of the truck or side of the truck, or where are they, if you know?

A. Well, my recollection, in each tank they have a place where they connect it.

Q. And that is generally on the side closest to the point that they are filling, isn't that correct?

A. Yes.

Q. In this case it would have been on the side closest to you, that is, on the right-hand side of the tank? A. That's right. [96]

Q. Now after he had moved his truck to that position that you have indicated on the map, on this drawing, would you please relate, to the best of your recollection, what he did, what Mr. Nielson did? A. Well, he came back in the building.

Q. What did he do when he entered the building the second time?

A. Went back on the stool and watched the pictures.

Q. Where was Mr. Klitz at that time, if you recall?

(Testimony of Ross Fred Moseley.)

A. He was at the rear end of the building.

Q. That has been designated by an "x," extreme easterly end of the bar?

A. That is right. He was right close to the pictures.

Q. What was he doing?

A. Well, apparently—I don't know—he was just watching the machine operate.

Q. Isn't it a fact that the machine had started to flicker to such an extent that it was not visible and Mr. Klitz was seeing if he could repair it?

A. Well, it could be.

Q. Where was Mr. Nielson?

A. He was sitting about in the middle of the room.

Q. Was Bill Hack there at that time?

A. I don't know whether he was there at that time or not. He was in and out. [97]

Q. Where were you?

A. I was in the building.

Q. Where? A. Behind the bar.

Q. Now how long after Mr. Nielson returned to the building inside the saloon was the fire discovered? A. The last time.

Q. Was it discovered more than once?

A. The last time he came in the building.

Q. Is that when you discovered the fire?

A. Ask that again.

Q. You say Mr. Nielson came back in the bar, is that right? A. Right.

(Testimony of Ross Fred Moseley.)

Q. And sat down and watched the movie?

A. That is right.

Q. In a machine which Mr. Klitz was attempting to repair? A. Yes.

Q. How long after he came in and sat down in the middle of the floor on the stool was the fire started or observed?

A. Well, possibly fifteen, maybe twenty, minutes.

Q. At that time where were you?

A. I was behind the bar.

Q. Is that the bar designated, behind the counter?

A. That wasn't my position all the time he was there.

Q. Where were you when you first saw the fire?

A. I was right there behind the counter.

Q. In that connection I will ask you to state if you noted the fire from your own observation or was it called to your attention?

A. Well, nobody hollered "Fire." I saw it about the time Mr. Nielson did.

Q. Mr. Nielson was here looking at a machine at the east end of the building?

A. That is correct.

Q. With his back to this end of the building?

A. That is right.

Q. The west end. Now did you call the fire to his attention or did he see it?

A. I imagine he saw it. I think he and I saw the fire.

Q. Therefore your testimony is that Mr. Nielson was facing east? A. That is right.

(Testimony of Ross Fred Moseley.)

Q. Looking at a movie? A. That is right.

Q. And without anybody calling it to his attention, he saw a fire which was to his back and outside the building?

A. He evidently did. Nobody hollered "Fire."

Q. Just exactly what did you do?

A. I got out of there as quick as I could.

Q. How did you leave the premises? [99]

A. On the run.

Q. Out the front door? A. Yes, sir.

Q. The front door of the bar? A. Yes, sir.

Q. And how did Mr. Nielson leave?

A. Well, he was coming pretty fast too.

Q. I believe you testified on direct examination, Mr. Moseley, that you and Mr. Nielson got out of that door just about the same time?

A. We did.

Q. Now I want you to describe just exactly where the fire was when you went outside.

A. Up under the canopy and all over the cover.

Q. Now I want you to describe exactly what Mr. Nielson did.

A. Well, he did something to the truck. He ran up to it and then the next thing he got in the cab.

Q. I will ask you to state if he detached the hose from that tank?

A. Well, I wouldn't say just whether he did or not.

Q. I will ask you to state if he pulled away, pulling the hose with him? A. Yes.

Q. Therefore it follows, does it not, Mr. Moseley,

(Testimony of Ross Fred Moseley.)

from your testimony, that if the hose was attached to the tank flowing gasoline, and Mr. Nielson drove away and didn't take the hose [100] with him, he must have detached it from the tank from which he was delivering it. A. Yes.

Q. And he was doing that at a time he turned off the flowing gasoline, at a time when that truck was completely enveloped in flames?

A. That is right.

Q. He went right straight in the flames and did it? A. That is right.

Q. Turned off the flowing gasoline?

A. That's right.

Q. Did you see Mr. Nielson at any time afterward? A. Yes.

Q. I will ask you to state if he was severely burned?

A. Well, apparently he was. I wouldn't state severely, but badly.

Q. Now I believe you stated that at the time that fire broke out there was nothing in operation in the store? A. That's right.

Q. The movie machine was operating, wasn't it?

A. Yes.

Q. Therefore, is it your desire now to change your testimony to this extent, that there was nothing operating in the premises except the movie machine?

Mr. Parry: I object to the form of the question, of [101] changing testimony.

The Court: Objection sustained.

Q. What is your testimony now?

(Testimony of Ross Fred Moseley.)

A. Well, there wasn't any stove going any place.

Q. Were there any stoves going?

A. There were not.

Q. Were there any electrical appliances in operation at the time of the fire?

A. Nothing outside that movie.

Q. Now on direct examination you testified concerning a refrigerator. That was a kerosene refrigerator, was it not?

A. Yes, kerosene, oil.

Q. And when in operation that has an open flame, does it not?

A. I don't know. I don't know much about those refrigerators.

Q. Had you ever had occasion to use that refrigerator prior to this day? A. What?

Q. Did you ever have occasion to use the refrigerator prior to the third of May, 1947?

A. No.

Q. It had never been used during the time that you were on the premises?

A. Oh, it was in there when I first went to the place, but then he put in an electric.

Q. In other words, you were present on the premises when that [102] refrigerator was actually being used?

A. Yes, I was there when Mr. Barnes was there, but I never tended it.

Q. Did you ever examine it to the extent of determining that when it was in operation there was an open flame?

(Testimony of Ross Fred Moseley.)

A. I told you I never tended it.

Q. Would you come down to this board and designate the place where that kerosene refrigerator was the day of the fire?

A. Well, it was in the grocery store.

Q. Will you please come down and point out where in the grocery store?

A. Well, it was sitting right in here, this point. (Indicating.)

Q. Would you mark that with an "R"? (Witness complies.) At your best estimate, how far was this refrigerator from the door leading into the store?

A. Well, I would judge about four feet.

Q. In other words, from the opening to the refrigerator was a distance of approximately four feet? A. Yes.

Q. And this door was open? A. Yes.

Q. Now you say that there was a wind blowing that day, a hard wind? A. That's right.

Q. It was blowing south and west? [103]

A. From the southwest.

Q. Am I correct then in saying that the wind was blowing generally in this direction?

Mr. Parry: That is objected to——

Q. What I would like to know, just which way the wind was blowing, like this, or like this?

A. From the southwest.

Q. Like this? A. Southwest.

Q. In other words, from this direction it was

(Testimony of Ross Fred Moseley.)

blowing right straight in the direction of the canopy and that open door? A. Yes.

Q. Now, Mr. Moseley, I want you to state whether or not from the instant that you discovered the fire you did anything at all to combat the flames or to salvage any of the equipment or merchandise on the premises?

A. I did not. It was impossible.

Q. Did anybody fight that fire?

A. Well, after help got to it, we did the best we could do, but nothing we could do.

Q. Who did it? A. Who do you mean?

Q. Name the individuals.

A. Oh gosh, there were fifty or a hunrded.

Q. Fifty or a hundred there in Contact, Mr. Moseley? [104] A. No, on the way.

Q. Do you recall the names of any of them?

A. Yes.

Q. Who?

A. Well, Mr. Zilliox was there, Mr. Ray Ward, Joe Hollis.

Q. Now would you describe generally what they did? A. What they did?

Q. Yes, in fighting this fire?

A. There wasn't anything they could do.

Q. Now, Mr. Moseley, you said that they fought the fire. Will you please tell this Court and jury just exactly what they did?

A. Well, there was no canopy after they got there. Some of the boys helped Nielson on his truck, helped get the fire extinguished on that. As far

(Testimony of Ross Fred Moseley.)

as the building, there was nothing they could do.

Q. Mr. Moseley, you stated both on direct and cross-examination that there were individuals who fought that fire at Hot Springs.

Mr. Parry: I object to this form of question. It is not according to the record—no such statement.

Mr. Puccinelli: I ask for the record in that respect.

Q. Did anybody fight the fire at Hot Springs?

A. Well, no. I will say no; there was nothing they could do.

Q. Isn't it a fact that previously you testified they did?

A. Well, they made an effort. There was nothing they could do to the building and trailer. They did make a little effort [105] to save them.

Q. You say they made some effort?

A. Yes.

Q. I want you to relate exactly what effort they made. What did they do?

A. They did nothing but try.

Q. So they fought the fire by doing nothing—is that your answer? A. Yes.

Q. As a matter of fact, no one at those premises, as far as you can remember, did anything, attempt to stop the fire or save any of the merchandise, isn't that the truth?

A. There were attempts made, but it was hopeless.

Q. Isn't it a fact, Mr. Moseley, that what actu-

(Testimony of Ross Fred Moseley.)

ally happened was that everybody that was there went up on the side hill and watched the fire?

A. No, I don't think so.

Q. That is not true?

A. I don't think that is a true statement.

Q. Now during the time when Mr. Nielson drove away and the time he entered this truck, it was ablaze, was it? A. Yes.

Q. He drove it off? A. He did.

Q. How far did he drive it? [106]

A. About three hundred yards.

Q. In what direction? A. North.

Q. I am going to ask the privilege at this time —you check me if I am in error—highway 93 is generally like that, is it not?

A. It makes a little curve there.

Q. A slight turn, but for the sake of simply explaining to the jury, Highway 93 immediately joins on to the approximate area where these two outside pumps were? A. Yes.

Q. You say Mr. Nielson drove north—was he on Highway 93? A. Yes.

Q. And to the best of your recollection it was about three hundred yards?

A. I judge.

Q. I believe you stated that among other things you had in the store building $300 in the bar register, $75 in the grocery register, $800 underneath the counter and another thousand dollars underneath the counter? A. That's right.

(Testimony of Ross Fred Moseley.)

Q. Now what time did you open business on that day? A. In the morning?

Q. Yes. A. Seven o'clock in the morning.

Q. I believe you called one of the registers as being the bar register, is that correct?

A. Yes, sir.

Q. Is that the cash register used in connection with the operation of the bar?

A. That's right.

Q. Now is it generally your practice to keep $300 in cash in the cash register?

A. Not at all times.

Q. How much did you start the day out with generally?

A. Usually had $300 in the bar and about that much in the grocery and cash register. We had the registers separate.

Q. But it was your practice at the beginning of a business day to put $300 in currency and cash in both the bar register and also in the grocery register? A. That's right.

Q. Then I believe you stated that you had $800 which belonged to the card table?

A. That is right.

Q. What time did you generally open?

A. Some days didn't open at all.

Q. Was it in operation that day?

A. No, not that day.

Q. Was the dealer there? A. No. [108]

Q. Did the dealer ever come there on the day of the fire?

(Testimony of Ross Fred Moseley.)

A. No, he wasn't there the day of the fire.

Q. Now even though the game wasn't in operation, even though your dealer did not come there on the day of the fire, you nevertheless kept $800 of the gambling money underneath the lunch counter? A. That is where it was.

Q. Was that your general practice?

A. It was in my charge.

Q. And as a general practice did you always bring the money in there, whatever cash there might be on the premises?

A. I usually took the cash box in my cabin at night. I did when I was on day shift.

Q. And this day was a working day, or what did you do that day? Did you take the cash with you?

A. I brought the cash box back in the morning.

Q. When you opened up? A. That's right.

Q. And you always brought the gambling money with you, whether you were going to operate the game or not? A. Yes.

Q. That game was licensed?

A. Absolutely.

Q. I believe you stated that you had a thousand dollars in what you call a lock box? [109]

A. A slot box, slot machine.

Q. You kept a thousand dollars belonging to the slot machines? A. That's right.

Q. And what denominations?

A. Currency and silver.

Q. How much of that thousand dollars was in silver? A. Well, about half of it.

(Testimony of Ross Fred Moseley.)

Q. Five hundred. How many slot machines did you have on the premises? A. Four.

Q. And what denominations were they?

A. They were from five cents up to half dollars.

Q. Well, how many nickel machines did you have? A. One nickel machine.

Q. How many ten cent ones? A. One.

Q. How many quarters? A. One.

Q. And how many fifty cent machines?

A. One.

Q. I am not sure that I understand—did this thousand dollars represent money which had been taken from the slot machines?

A. That's right, belonged to the slot machines.

Q. It was the take from the slot machines?

A. Yes, the take, slot machine money. [110]

Q. How often did you bank, or Mr. Herzinger bank, the proceeds of the gambling from the four slot machines?

A. Well, usually about once a week. This particular time it had run over Saturday, been about ten days since he banked.

Q. And was the take from the four slot machines in ten days?

A. No, it would be the take, but it was the money that belonged to them that accumulated.

Q. Where had the money come from, if you know? A. Where had it come from?

Q. Yes, the thousand dollars?

(Testimony of Ross Fred Moseley.)

A. From the slot machines.

Q. In how long a time?

A. Well, possibly ten days' time.

Q. So that the four machines yielded you approximately $100 a day, is that correct?

A. Well, I wouldn't make a definite figure. Some days it would be better than others.

Q. And that was always kept underneath this lunch counter? A. Not always.

Q. But it was this day?

A. It was that day. Taken out of there at night.

Q. And you had a thousand dollars worth of checks? A. Yes.

Q. Do you recall any of the checks?

A. Oh yes, I had a list of them. [111]

Q. What? A. I had a list of them.

Q. From your memory do you recall any of the checks? A. Any particular ones?

Q. Yes.

A. Oh yes, had some on the U. C. Land and Cattle Company. We had some pension checks, had some highway checks, we had checks from the first of the month.

Q. Where did you keep those? Where were they the day of the fire?

A. They were in the cash box, but that is what we call the bar box.

Q. So therefore we have five different places where money was kept in that bar room?

A. That's right.

Q. There was the bar cash box, right?

(Testimony of Ross Fred Moseley.)

A. Yes.

Q. Then there was the, I believe you refer to as the grocery register? A. Grocery register.

Q. Then there was the crap table cash?

A. That's right.

Q. Which is in one container, and then there was the slot machine container?

A. That is right. [112]

Q. And then there was a fifth container in which you kept the checks separately?

A. That is right.

Q. And they were all there underneath that lunch counter that day? A. Yes.

Q. And is that generally where you kept all these containers, underneath the lunch counter?

A. During the day time.

Q. Did you make any attempt to remove any part of the cash, that is the silver, currency or checks, from those premises after having discovered the fire? A. No.

The Court: This is a good time to take a recess.

(Recess taken at 4:30 p.m.)

Thursday—February 9, 1950, 10:00 A.M.

All attorneys present.

Presence of the jury stipulated.

Mr. Moseley resumes the witness stand on further

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Moseley, yesterday I believe, at the beginning of your direct examination, you testified that you had prepared this plat? [113]

A. That is right.

Q. And that had been drawn from your recollection of the permises, is that correct?

A. Yes.

Q. This plat differs, does it not, from the map which you have drawn on the board?

A. Some.

Q. And you drew this with the assistance of your counsel? A. I did.

Q. And with their assistance, your memory was refreshed, is that correct? A. Yes.

Q. Now I would like to inquire, Mr. Moseley, about the electrical fixtures. When you first went to the Mineral Hot Springs, who was operating the place? A. Mr. Brown.

Q. And it was during the time that you were there that Mr. Herzinger purchased Mr. Brown's interest? A. That's right.

Q. And you remained at the place?

A. That's right.

(Testimony of Ross Fred Moseley.)

Q. Now from the day that you went to the Mineral Hot Springs up to the date of the fire, which was May 3, 1947, had those electrical fixtures or appliances or wiring ever been changed in any way, to your knowledge? [114]

A. Not to my knowledge.

Q. So that at the date of the fire they were substantially in the same condition and position as the date that you went on the premises during the ownership of Mr. Brown?

A. To my knowledge.

Q. Do you recall on the day of the fire where Mr. Zilliox was?

A. Well, right after the fire, after the building had caved in, I saw Mr. Zilliox on the premises.

Q. Did you see him at any time prior to that?

A. Not that day.

Q. How much time had transpired, to your recollection, between the time that you first noted the fire and the time that you saw Jim Zilliox?

A. Possibly two hours.

Q. You saw him two hours later?

A. About.

Q. I believe you testified yesterday, both on direct and cross-examination, Mr. Moseley, that some of the boys helped Jim Zilliox put the fire out on Mr. Nielson's truck?

A. That was my impression.

Q. That was another assumption?

A. That's right.

(Testimony of Ross Fred Moseley.)

Q. Did you see Mr. Zilliox do anything toward fighting the fire at Mineral Hot Springs proper?

A. Yes, there was a trailer house that was just about down, a [115] little left. I saw Mr. Zilliox take some water over there and throw on the remains of that trailer.

Q. Was that two hours after the fire started?

A. Possibly.

Q. That fire burned for two hours?

A. Well, it was still burning on this trailer.

Q. What was the condition of the premises at that time, that is, the saloon and grocery?

A. The main premises?

Q. Yes. A. They were all mashed.

Q. And the only thing that you saw Mr. Zilliox do was lend his efforts toward extinguishing the fire which was on the trailer house?

A. As I remember.

Q. And that is the trailer house which you have designated at the bottom of this map on the blackboard by the letter "T"? A. That's right.

Q. By the way, where was Bill Hacker at that time? A. He was on the premises.

Q. What was he doing? A. I couldn't say.

Q. Now yesterday you testified on cross and on direct examination that among other things there were destroyed approximately [116] a thousand dollars worth of checks? A. That's right.

Q. Do you remember some of the checks?

A. Yes.

Q. Would you name for me the checks that you

(Testimony of Ross Fred Moseley.)

recall having cashed; that is, who were they made in favor of?

A. I couldn't tell you who they were made in favor of.

Q. Do you remember the amount?

A. Oh, possibly some of them.

Q. Would you please give me the amounts of some of the checks?

A. Well, some of the company checks, they would run around a hundred and hundred and twenty-five.

Q. What do you mean by company checks?

A. Well, we call them U. C. Land and Cattle Company.

Q. Now you say those were between $100 and $125? A. That's right.

Q. How many of those checks did you cash?

A. I couldn't give you a definite answer.

Q. To your best recollection?

A. Well, I imagine about six hundred, five hundred or six hundred.

Q. Do you recall any of the men who presented these five or six hundred dollars of company checks to you? A. No, I couldn't.

Q. Now relate to me some of the other [117] checks.

A. The men they were drawn to?

Q. Either the men they were drawn to, the amounts, or the company upon whom they were drawn.

A. They were drawn on the U. C. Land and Cattle Company.

(Testimony of Ross Fred Moseley.)

Q. We have five or six of those?

A. That's right.

Q. That was $500 or $600?

A. Approximately.

Q. You testified there was a thousand dollars lost. A. Well, there were other checks.

Q. I would like to inquire into the balance of the checks—what company issued them, in whose favor and in what amount, if you recall.

A. We had some government checks there, some of the soldier boys that had those government checks.

Q. How many of them?

A. Well, there was denominations from $15 up to $50.

Q. And how many of those checks?

A. Well, I would say we had possibly a couple of hundred.

Q. A couple of hundred checks?

A. A couple of hundred dollars in government checks.

Q. Now the balance.

A. Well, right after the first of the month we always got those pension checks up there, old pensioners' checks. They ran around $50 to $55. We had possibly a couple of hundred of [118] them.

Q. So that I may be correct, you had between $500 and $600 worth of U. C. Land and Cattle Company checks? A. Yes.

Q. Some $200 in government checks, that is, United States government? A. Yes.

(Testimony of Ross Fred Moseley.)

Q. And some $200 in pension checks?

A. That's right.

Q. Did you ever report the loss of these checks to the U. C. Land and Cattle Company?

A. Yes, they were reported.

Q. Were they reimbursed? A. No.

Q. You never got your money back although you told them you had lost the checks which they had issued to their men? A. That's right.

Q. Who did you report your loss to, insofar as checks relating to the U. C. Land and Cattle Company?

A. We reported them to Mr. McLean, the bookkeeper at the ranch.

Q. Just what did you tell Mr. McLean?

A. We told him that we cashed these checks but we didn't have a list of them and we presumed that he did. Well, he asked for six months to verify those checks. We were never reimbursed.

Q. Mr. McLean asked you, in substance, to allow him a period [119] of six months to verify the loss, is that correct? A. That's right.

Q. At the end of the six months did you go back to Mr. McLean and ask to be reimbursed for the loss of those company checks?

A. Well, we talked about it every time. Never got an adjustment made.

Q. So that as of today, the year 1950, you have not been reimubursed? A. That's right.

Q. And no steps have been taken?

A. That's right.

(Testimony of Ross Fred Moseley.)

Q. To effect a collection of that money, save and except to meet with him and discuss it?

A. That is right.

Q. How many times was it discussed with the U. C. Land and Cattle Company since that date?

A. We never did discuss it with anybody but Mr. McLean.

Q. How many times?

A. Oh, possibly three or four different times.

Q. What did Mr. McLean say the second time you went back, after the six months had expired?

A. Well, he had been pretty busy with company's business and he hadn't had time to give it his attention.

Q. Did he ask for additional time?

A. I think that was the deal. [120]

Q. To come back later? A. Yes.

Q. Did you go back later?

A. No, I don't believe I did.

Q. Well now you said you talked to him five or six times. A. That's right.

Q. The first time you talked to him he said he wanted six months? A. That's right.

Q. Then at the end of six months you went back and talked to him the second time?

A. That's right.

Q. Now tell me about the other three times.

A. Well, he come up to Hot Springs and we just discussed it but there was never any action taken.

Q. What reason did he give you on the last three times for nonpayment of the checks?

(Testimony of Ross Fred Moseley.)

A. Well, he was busy with the company's business.

Q. He was busy with the company's business?

A. That's right.

Q. Wasn't this company business?

Mr. Parry: We object to that as argumentative.

The Court: Objection sustained.

Q. The U. C. Land and Cattle Company is a large industry, is it not? It was called by counsel an empire. [121]

A. It was at that time.

Q. And yet you have been unable to effect a collection of $600 from the U. C. Land and Cattle Company? A. That is right.

Q. Let us go to the government checks. What, if any, effort did you make to collect these checks from the government, the army checks?

A. We made inquiries as to how we could collect them. We were advised that they were the same as currency.

Q. You were advised that a government check was the same as currency and if destroyed couldn't be recovered? A. Yes.

Q. Who advised you that way?

A. You mean what was his name?

Q. Yes.

A. Well, Del Hardy at Contact was one of them.

Q. Who was he?

A. You mean his occupation?

Q. Yes.

A. Well, he was deputy sheriff, I believe.

(Testimony of Ross Fred Moseley.)

Q. As a matter of fact, he was constable in Contact, wasn't he? A. Well, possibly.

Q. Did you rest upon the advice given to you by the constable in Contact, or did you make further inquiries to see whether or not you could recover these checks? [122] A. No.

Q. You stopped with the advice of the constable of Contact? A. That's right.

Q. Now what about the pension checks, what effort, if any, did you make to collect the pension checks?

A. We collected three pension checks to my knowledge, had new checks issued.

Q. So you have recovered a portion of that thousand dollars then?

A. Well, we will have. We got three pension checks.

Q. You got them back? A. Yes.

Q. And you cashed them? A. Sure.

Q. So then when you testified you had lost a thousand dollars in checks that wasn't a correct statement?

A. Well, we had a thousand dollars in checks.

Q. Part of it you recovered?

A. That is what we recovered, three checks, to my knowledge.

Q. How much were they?

A. Those pension checks were about $55 each.

Q. So you have recovered approximately $165?

A. Approximately.

Q. So deducting the $165 from the thousand

(Testimony of Ross Fred Moseley.)

dollars, the total which remains is actually what you claim you have lost as the [123] result of the fire, isn't that correct?

A. That would be about fair.

Q. By the way, when was the last time you talked to Mr. McLean about the $600?

A. Oh, it was probably a year after the fire.

Q. That would be approximately May of 1948, is that right? A. Yes.

Q. And no further meetings or discussions have been had with Mr. McLean since May of 1948?

A. No.

Q. By the way, Mr. Moseley, yesterday you testified on direct examination this was a frame structure. What was the front of the grocery store building?

A. What do you mean, what did it consist of?

Q. Yes. A. The structure?

Q. Yes.

A. Well, it was a frame structure. It was mostly glass front.

Q. In fact, it was covered with sandstone, wasn't it, a sandstone front on that store?

A. Oh, you mean the building?

Q. Yes.

A. Yes, the main structure was sandstone.

Q. What did you sell in that store?

A. Sold groceries, kerosene, overalls. [124]

Q. What kind of groceries, Mr. Moseley?

A. Anything we found room for.

Q. Did you sell meat? A. Yes, sir.

(Testimony of Ross Fred Moseley.)

Q. Fresh meat? A. No, sir.

Q. What kind of meat? A. Cured meat.

Q. What kind of cured meats?

A. Well, hams and bacon.

Q. Hams and bacon. Where did you keep the ham and bacon?

A. Oh, different places about the store, wherever it was convenient.

Q. In the refrigerator? A. No.

Q. Of any kind? A. No.

Q. Did you sell butter?

A. Yes, we had butter.

Q. Where did you keep the butter?

A. Kept it in cartons.

Q. In the refrigerator?

A. Not at that time.

Q. You kept butter in the store without refrigeration?

A. Well, we had a refrigerator in the bar room.

Q. But that was in the bar room, wasn't it?

A. That's right.

Q. So that if you were in the store and wanted to sell a pound of butter, you had to leave the grocery and go in and get it and come back?

A. We did a lot of times.

Q. But you had no refrigeration in the store, although you sold cured meats and butter?

A. Well, our butter we kept in the cooler in the bar room most of the time. Depends on the weather.

Q. Where did you have the butter stored on this day, if you recall?

(Testimony of Ross Fred Moseley.)

A. Well, it could have been some in the grocery store and some in the bar room.

Q. You said it could have been. Do you know where it was?

A. I don't know as I can say now. We might not have had any butter on hand that day.

Q. Do you know if you had on that day?

A. No.

Q. You were the manager of this place?

A. That's right.

Q. Did you sell milk? A. No.

Q. At no time? A. Yes, we did at [126] times.

Q. Now when you had milk on hand, where did you keep it? A. Put it in the cooler.

Q. Where is that? A. In the bar room.

Q. So although you had a store, out of which you were dispensing groceries, whatever refrigeration you needed in connection with the store you got in the bar room? A. That's right.

Q. Yesterday you testified that some of your cured meats you had in the refrigerator which was in the store, which on this map you designated by the circle? A. That is right.

Q. Did you have cured meats in it that day?

A. We must have because there was some in there after the fire.

Q. Did you see the remains of those meats in that refrigerator after the fire?

A. I saw a portion of it.

Q. Who was with you when you saw it?

(Testimony of Ross Fred Moseley.)

A. I wouldn't know.

Q. How long after the fire?

A. Possibly the next day.

Q. So that the next day you now testify that you saw the remains of meat in this refrigerator?

A. That's right. [127]

Q. Which was in the store?

A. That is right.

Q. And that was a kerosene operated refrigerator? A. Well, it was an oil refrigerator.

Q. Now, Mr. Moseley, do you know anything about the mechanics of that refrigerator, that oil refrigerator? Do you know how it worked?

A. No.

Q. You said you knew it was an oil refrigerator. How did you know that?

A. Well, that is the impression I had of it.

Q. Is that another assumption?

A. That is what I was told it was.

Q. Did you ever put any oil in it?

A. Never did.

Q. Who took care of it? A. Nobody.

Q. Well, did you have an unlimited quantity of oil in there that you never had to take care of it?

Mr. Parry: Objected to as argumentative. It is the evidence of the witness it was not operating.

Mr. Puccinelli: That is not the record.

The Court: Objection will be overruled.

Q. Did you understand my question?

A. Well, not thoroughly. [128]

(Testimony of Ross Fred Moseley.)

Q. You have testified that this was an oil refrigerator? A. I did.

Q. You testified that your knowledge of that came from what some one told you?

A. It was an oil refrigerator to my knowledge.

Q. Well, did you ever put any oil in it?

A. I never did.

Q. Did any one put any oil in it?

A. It was not in operation at the time. Hadn't used that since January, when it was in the bar room.

Q. Let us go back to January, when it was in the bar room. When you operated it, how was it operated?

A. Operated by coal oil, I presume.

Q. Kerosene or coal oil? A. Yes.

Q. What would you do in order to get refrigeration?

A. I never tended it. I never took care of it.

Q. But you do know it was kerosene or coal oil?

A. I presume it was.

Q. That was needed to operate the refrigerator?

A. Yes.

Q. Mr. Moseley, you testified that of the total of $200 in pension checks you had recovered $165?

A. Yes.

Q. Whose checks did you recover? [129]

A. Well, as I remember, there was one Mr. Ole Hause and Benny Hart and I don't just recall the other one. It could have been Mr Hazelwood, but I wouldn't say positively.

(Testimony of Ross Fred Moseley.)

Q. Is that Tex Hazelwood?

A. That's right.

Q. Whose check remains unknown at this time?

A. Well, we wouldn't know every person.

Q. Well, have all of your pensions checks been collected?

A. Well, those two are all I have in mind now.

Q. You said there were four altogether?

A. Those three.

Q. You said you collected three?

A. But it is not clear in my mind who the other one was.

Q. There remains one which has not been collected.

A. No, the others have not been collected. To my knowledge there were four of them collected.

Q. So that the $200 represented by pension checks have all been collected? A. Yes.

Q. And that figure of $200 has not actually been lost because you have been reimbursed?

A. That's right.

Q. So that reduces the amount of unrecovered checks for the present at least down to $800?

A. Approximately. [130]

Q. Did you see Ray Ward there that day?

A. Yes, sir.

Q. In a conversation which related to the trailer house, do you recall stating to Ray Ward, "Let her burn"? A. No.

Q. Would you say that you did not make such a statement? A. I said no.

(Testimony of Ross Fred Moseley.)

Q. In other words, you did not make such a statement? A. Not to my knowledge.

Q. The wiring underneath the cabin, I believe you stated was insulated wire? A. Yes.

Q. Was that wire in turn contained in a conduit?

A. To the pumps it came down from the main line between the grocery store and cabin. It was run through pipe under the ground to the pipes.

Q. Underneath the canopy there were many lights, were there not? A. That is right.

Q. Every so often there would be a bulb?

A. That is right.

Q. Describe to me the connection at the different points where the bulbs were going around the canopy. A. What do you mean?

Q. Well, the socket—how was it put in?

A. Well, those bulbs screwed into the socket.

Q. You had to cut the metal container, did you?

A. No, that was rubber covered around the canopy. That was insulated with rubber around the canopy, the wire that went around the canopy.

Q. The wiring underneath the canopy wasn't in any metal or other protective conduit?

A. No, not around the canopy it wasn't in metal.

Q. I show you a photograph which has been marked Defendant's Exhibit OA for identification, and ask you if you are able to identify the premises therein depicted?

A. Well, that is a photograph of the buildings.

Q. I ask you if the photograph there depicts the

(Testimony of Ross Fred Moseley.)

buildings substantially in the same condition as they were the date of the fire?

A. Well, that is a very true photograph.

Mr. Puccinelli: I offer this in evidence.

The Court: Any objection?

Mr. Wilson: No objection.

The Court: It may be admitted in evidence.

Q. I show you what has been marked Exhibit OB for identification, and want you to examine it and identify it, if you can. What is it?

A. That is the place the day before the fire.

Q. A different view?

A. That's right. [132]

Q. I will ask you if this photograph represents substantially the premises as being in the same condition as they were the day of the fire?

A. As they were the day before the fire.

Q. Just immediately preceding the fire?

A. That's right.

Mr. Puccinelli: I offer this in evidence, if your Honor please.

Q. I now show you what has been marked Defendant's Exhibit OC for identification and Defendant's Exhibit OD for identification. I want you to examine them and state what is therein depicted, if you can.

Mr. Wilson: No objection to OB.

The Court: It may be admitted.

Q. What are those, Mr. Moseley?

A. Those are photographs of the buildings.

(Testimony of Ross Fred Moseley.)

Q. Do they represent substantially those premises as being in the same condition as they were at the time just immediately preceding the fire?

A. I would say yes.

Mr. Puccinelli: I offer Exhibits OC and OD for identification in evidence.

Mr. Wilson: No objection to OC, your Honor.

The Court: It may be admitted.

Mr. Wilson: No objection to OD. [133]

The Court: It may be admitted.

Q. Now, Mr. Moseley, you have testified that in connection with the bar you also operated a lunch counter.

A. Beg pardon?

Q. I believe you testified that in connection with the operation of the premises, especially the bar, you operated a lunch counter? A. We did.

Q. What did you sell at that lunch counter?

A. Well, we used that more for parties than we did—we didn't have any—what I mean, we didn't operate it all the time.

Q. When you did operate it, what did you sell?

A. Well, sold everything in the lunch line.

Q. What?

A. Well, you know, for lunches.

Q. Well, did you sell hot foods?

A. Hot dogs, hot soups, anything you get at a lunch counter.

Q. You sold hot dogs? A. That's right.

Q. Where did you keep the commodities?

A. Kept those in the cooler.

(Testimony of Ross Fred Moseley.)

Q. In the bar room? A. In the bar room.

Q. Did you have ice in the bar room?

A. Well, at times. [134]

Q. Did you use ice at all in the making of mixed drinks? A. That's right.

Q. Where did you get your ice from?

A. Twin Falls, Idaho.

Q. How far is Twin Falls from Contact?

A. About sixty-five miles.

Q. And the ice company came from Twin Falls to Contact to deliver you ice? A. No, sir.

Q. Did you go get it?

A. Sometimes. We would get it various ways; anyway we could get it.

Q. Where did you store that?

A. Well, we had it stored in an ice box, a wooden box.

Q. Where was that? A. Behind the bar.

Q. How much ice would you buy?

A. About two hundred pounds.

Q. And you kept that in an open wooden box behind the bar? A. A portion of it.

Q. As manager, did you make current quarterly reports to the Nevada Tax Commission of all of your receipts from the slot machines and gambling?

A. Personally I never did.

Q. You never did? [135] A. No.

Q. You have designated one of the buildings as the oil house? A. That's right.

Q. What did you store in the oil house?

A. Motor oil, kerosene, lamp gas, empty bottles.

(Testimony by Ross Fred Moseley.)

Q. When the refrigerator was in operation, did you keep the kerosene that was needed to operate that refrigerator in this oil house?

A. We didn't operate the refrigerator.

Q. Wasn't the refrigerator ever operated while you were there?

A. It was, yes, while I was there.

Q. Well, when it was operated, did you keep the kerosene in that oil house?

A. That is where we kept the kerosene, in that building.

Q. Did you ever use that refrigerator to manufacture ice at any time?

A. It has been used, yes.

Q. While you were there? A. That's right.

Mr. Puccinelli: That is all, thank you, Mr. Moseley.

Cross-Examination

By Mr. Platt:

Q. Mr. Moseley, have you any knowledge about the construction of the gasoline pumps that were immediately in front of the premises here? If you have, say so and if you have not, say so. [136]

A. Do I have knowledge of them?

Q. Yes, have you any knowledge of the structure or construction of the two pumps?

A. Previous to the fire?

Q. Yes.

A. I have a knowledge of them, yes.

Q. Well, do you know whether or not they were

(Testimony by Ross Fred Moseley.)

operated by independent motors within the pumps?

A. They were. Each pump had a motor.

Q. You are sure of that, aren't you?

A. Well, I am positive.

Q. The reason I am asking the question is that I gather from one of your answers that possibly they were operated by the electrical system that permeated the building, but you now tell me that you have knowledge that these gasoline pumps were operated by an independent motor and that is a fact?

A. Yes, each pump had a motor.

Q. That motor was within each pump?

A. That's right.

Q. And covered up and concealed?

A. That's right.

Mr. Platt: That is all.

Redirect Examination

By Mr. Parry:

Q. Were those motors connected to this electrical system that, [137] to use Mr. Platt's words, permeated the building?

A. They were connected with the power plant.

Q. That is what made the motors run?

A. That is right.

Q. Where was the switch that controlled the electricity going out to the motors?

A. Inside the motors.

Q. Did you keep that switch turned on or off?

A. We always kept that switch off.

Q. Why did you do that?

(Testimony by Ross Fred Moseley.)

A. Well, somebody might come up there and help themselves to gasoline. It was the custom of the place.

Q. And was there a switch controlling the lights under the canopy? A. That's right.

Q. Where was that switch?

A. That was in the bar room.

Q. And at noon on May 3rd were those lights on or off? A. They were off at noon time.

Q. And they were turned on by the switch in the bar room, is that correct?

A. That's right.

Q. There was some mention made yesterday of money being at various places. After the fire were you able to get in and see whether there was any melted silver, etc., of it? [138]

A. I imagine we did.

Q. How long was it before you could get in and find that melted silver?

A. Oh, some was recovered possibly the next day, but it was a week or more before we recovered what was in the basement.

Q. How long did that debris stay hot there?

A. Quite a while.

Q. Well—— A. A week or ten days.

Q. Did it keep on smoldering? A. Yes.

Q. So the next day after the fire and days after that, were there any subsequent explosions there?

A. Yes. It was pretty dangerous around there. A lot of stock of liquor in the basement and that burned for several days, kept smoldering, was dan-

(Testimony by Ross Fred Moseley.)

gerous. You might get hit with a broken bottle.

Q. The bottles exploded?

A. That's right. That is one reason we weren't around the basement for several days.

Q. Now then this trailer house that has been mentioned. Who owned the trailer house?

A. Mr. Herzinger.

Q. Was it destroyed? A. It was. [139]

Q. How soon did it catch fire during this conflagration that went on there, do you know?

A. Well, the building was down, of course, the heat was intense.

Q. How soon did the trailer catch fire?

A. Well, it was my recollection the building had fell down before the trailer started to burn.

Q. And then it caught fire? A. Yes.

Q. How much of it was consumed?

A. It was all consumed.

Q. How far is the power plant over north of what you call the pump house, how much distance was that there? A. About 300 feet.

Q. In other words, it was farther away than shows on the blackboard? A. That's right.

Q. Did the power plant catch fire or burn?

A. No.

Q. Mention has been made that Mr. Klitz did some work there on the electrical system. What part did he work on?

A. Well, he worked on the power plant. I don't know whether he worked on the line system or not.

Q. You do know he worked on the power plant?

(Testimony by Ross Fred Moseley.)

A. Yes. [140]

Q. Did you ever know of this man Mr. Harmer working around there?

A. Not to my knowledge.

Q. Did he work there while you were there?

A. Not to my knowledge.

Q. Did you ever pay him for working there?

A. Never did.

Q. Did you ever know of Mr. Herzinger paying him? A. I don't know.

Q. Some question was asked whether Mr. Klitz's car was under the canopy. Was any part of Mr. Klitz's car under the canopy at the time of the fire?

A. To my recollection it was not.

Q. Where did you place it in front of those buildings?

A. Well, my best recollection is in front of the cabin.

Q. That is the cabin between the grocery store and the oil house? A. That's right.

Q. When this fire occurred, what did you first notice? A. The flash.

Q. Was that flash reflected in the building any?

A. Yes.

Q. As you were standing there behind the bar were you looking toward Mr. Nielson?

A. Well, yes. [141]

Q. And what did you see him do there on the stool? A. Well, I seen him jump.

Q. Was there any sound accompanying the flash?

A. Well, I didn't hear a sound.

(Testimony by Ross Fred Moseley.)

Q. What did Mr. Nielson do, which way did he turn? A. He turned directly around.

Q. Toward you or away from you?

A. Toward me.

Q. Did you see his face? A. Yes.

Q. What kind of expression did he have on his face?

A. Well, I call it a surprised expression.

Q. Did he walk to the door or run?

A. He ran.

Q. When did you first work there at the Springs? I was a little confused on that.

A. Well, the first work I done for Mr. Herzinger was in March after he bought the place.

Q. March of what year?

A. That would be '46.

Q. And you had gone there originally when for Mr. Brown?

A. Well, I had been there with Mr. Brown since December before the fire, previous to it.

Q. I believe there is some testimony you went there in December, 1946, on cross-examination. If I have it correct, you went [142] to the place then in December, '45, is that right?

A. That is my first.

Q. And you started working for Mr. Herzinger when now? A. Some time in March, '46.

Q. Now when Mr. Herzinger came there to take the money to bank, did he take all the money you had? A. No.

Q. Considerable questions were asked you about

(Testimony by Ross Fred Moseley.)

this slot box money. Would he leave money in that slot box when he took money to the bank?

A. Sure.

Q. About how much would he leave with you when he went to the bank?

A. Well, that would vary, around $600 to a thousand dollars.

Q. When he took money out to go to the bank, how much would he leave?

A. Six hundred to a thousand, because he didn't bank every week.

Q. But when he did take it out of there to go to the bank, how much was he accustomed to leave?

A. Well, it would vary, from six hundred to a thousand.

Q. What was the purpose of that money?

A. Well, that was for the slot machines.

Q. Did you do sort of a general banking business for that community around there? [143]

A. Yes, we had to. We had to keep a lot of money around there in order to take care of these pensions and pay checks.

Q. Do you remember how long it had been before Mr. Herzinger had taken money to the bank prior to the fire? A. It had been past a week.

Q. More than a week?

A. That particular week end he was in Nevada or some place and he hadn't made his trip back yet.

Q. After the fire, when you went down there, did you find where the cash register from the grocery store and gas station had fallen, after the fire?

(Testimony by Ross Fred Moseley.)

A. Yes, we found it.

Q. Where was that register, the one out of the grocery store?

A. It was laying right in what had been part of the grocery store. There was no basement under the grocery store.

Q. What was the condition of the silver that had been in it?

A. Well, the silver dollars wasn't all destroyed. All the rest of the silver was pretty much run together, stuck together.

Q. Who assisted you in salvaging that burned silver? A. Mr. Herzinger.

Q. You and he picked up this melted silver there?

A. That's right.

Q. About how many of the silver dollars could you salvage and use over?

A. Well, I imagine, by my recollection, about twenty-five. [144]

Q. Did you find the register that had been in the bar? A. Yes.

Q. And there was some melted silver in that?

A. That's right.

Q. Do you know if Mr. Herzinger picked that up? A. Yes.

Q. And were there any silver dollars salvaged out of that register?

A. Well, just about the same amount, I imagine. I don't recall the amount.

Q. Was the remainder of it melted?

A. Well, it was stuck together.

(Testimony by Ross Fred Moseley.)

Q. Did you find the cash register from the lunch room? A. Well, we found where it had been.

Q. What did you find with reference to it?

A. Well, we found a little silver.

Q. What condition was that silver in?

A. Well, just the same as the other.

Q. Did you find where the slot machines had fallen into the basement? A. That's right.

Q. What happened to the money in the slot machines? A. It was pretty well melted.

Q. Did you pick it up?

A. We salvaged the, you would call it bullion, I suppose. [145]

Q. Did you find the bos that you had under the crap table? A. Yes.

Q. What was the condition of that?

A. That was down the basement. That was just a mass of silver.

Q. What happened to the bills that had been in there, the currency?

A. I don't know. Couldn't find them.

Q. Did you find the box that had the slot machine money in it? A. Yes.

Q. What was the condition of that box?

A. That was the same as the other box, all melted and stuck together.

Q. And you and Mr. Herzinger salvaged all the silver you could get out of there?

A. That's right.

(Testimony by Ross Fred Moseley.)

Q. Did Mr. Herzinger take it away or did you take it away? A. Mr. Herzinger.

Q. He is the man that knows about that. Now on this particular day when Mr. Nielson came up, do you know how long it had been since gas had been delivered?

A. Well, not exactly at that time. We get gas about every five days.

Q. How long had it been, as far as you know, since he had been up there to deliver gas?

A. Well, made a trip just about regular. [146]

Q. Some questions were asked yesterday about efforts to put the fire out. How soon were all the buildings a mass of flames there after the fire?

A. Just a matter of minutes.

Mr. Parry: I think that is all.

Re-Cross-Examination

By Mr. Puccinelli:

Q. You said that the debris, the remains of the fire, smoldered for ten days?

A. Oh, yes, there was fire in there ten days.

Q. Do you recall Mr. Odermatt coming to the Hot Springs the same day of the fire?

A. Yes, sir.

Q. Do you recall Mr. Warner coming there the next day? A. Well, I believe I do.

Q. Do you recall their making an examination of the premises and what remained, that is, going right through the premises and checking them?

A. That I did?

(Testimony by Ross Fred Moseley.)

Q. No, that they did. Do you recall their doing that?

A. No. I know they were on the premises. I don't recall their doing any checking.

Q. I believe you stated that to the best of your recollection the fire in the bar, that is, the general premises, was first and you watched that burn and then you saw the building cave [147] in and then you saw the trailer house on fire, is that right?

A. Yes.

Q. Where were you when you observed all this?

A. When I saw the trailer house on fire?

Q. Yes, when you saw the building fall in and the trailer house being destroyed, where were you?

A. I was on the premises, just far enough away so I wouldn't get burned.

Q. With reference to direction, were you south across the highway, west, north, or east?

A. Well, I was all around the place.

Q. Were you up on the hill to the west?

A. No, sir.

Q. Did you ever go over through the hills to the south? A. No, sir.

Q. Over the hills to the east? A. No.

Q. How close were you to the premises, to the actual burning? A. As close as I could get.

Q. You stayed as close as you could get?

A. Yes, for comfort.

Q. As I remember your testimony on direct examination and on cross, you stated the time you first noted the fire you were behind the cigar counter,

(Testimony by Ross Fred Moseley.)

which is in the upper left-hand corner of the bar room where you have designated with the [148] letter "x," is that correct? A. That's right.

Q. Mr. Nielson was seated in the middle of the bar room? A. That's right.

Q. You heard no noise. You saw just the flash?

A. Saw the flash.

Q. And then the length of time that it took you to leave your position behind the cigar counter and go out the door, as you said, in a hurry?

A. That's right.

Q. The entire premises were enveloped in a flame?

A. The front part was all flame when we went out.

Q. In other words, the entire front——

A. That's right.

Q. (continuing): ——of these premises, including the front of the bar? A. That's right.

Q. Now, Mr. Moseley, I may have misunderstood you, both yesterday and today. You were actually then at Hot Springs about 18 months before this fire took place, weren't you, instead of six months?

A. Well, yes. I established my residence there in '45, in December.

Q. So that you had been more or less familiar with the premises and in contact with all of the equipment and everything [149] else for 18 months actually before May 3rd of 1947? A. Yes.

Q. There was another thing. How many cash registers were actually on that place?

(Testimony of Ross Fred Moseley.)

A. There were three in operation.

Q. You had a cash register in the grocery store?

A. That's right.

Q. A cash register in the bar room that was used in connection with the bar? A. That's right.

Q. And you had a cash register in the lunch counter? A. That's right.

Q. During the course of the conversation yesterday, during the course of your examination yesterday, you gave testimony to the effect that there were $300 in the bar register? A. Yes, sir.

Q. Now which cash register is that, the one used in connection with the bar or in connection with the lunch counter?

A. That was the bar register.

Q. Did you have any money in the one in the lunch counter? A. Yes, sir.

Q. How much money did you have in there?

A. My recollection was $75 in there.

Q. And $75 in the one which was in the grocery store? A. About three hundred. [150]

Q. Three cash registers—one located in the grocery store? A. That's right.

Q. That contained $300? A. That's right.

Q. One in the bar containing $300?

A. That's right.

Q. One in connection with the lunch counter containing $75? A. That's right.

Q. Mr. Moseley, isn't it a fact that yesterday, both on direct and on cross-examination, you testified that as of the date of the fire you had $300 in

(Testimony of Ross Fred Moseley.)

the cash register that was in the bar room, you had $75 in the cash register which was in the grocery store? A. That was an error.

Q. Were you in error then?

A. That's right.

Q. Then what is your correct testimony?

A. It was $300 in the grocery store, $300 in the bar, and $75 in the lunch counter.

Q. So that in the three cash registers on those premises you had $675? A. That's right.

Q. And then in addition to that you had $800 in another container which you used in connection with the crap table? A. That's right. [151]

Q. Describe that container?

A. It was a tin box, what we call cash box.

Q. How large was it?

A. Well, it was about the size of these boxes used for fishing equipment, I would say 18 inches long, 8 inches wide and 8 inches deep.

Q. I believe you yesterday testified the money was half in currency and half in silver?

A. That is about right.

Q. Did you have $400 in silver in the box that size? A. In what box?

Q. In that box you just described as the one for carrying fishing tackle? A. Yes.

Q. Four hundred dollars in silver and four hundred dollars in currency in that size box?

A. I would say we had more than four hundred in currency.

(Testimony of Ross Fred Moseley.)

Q. Yesterday your testimony was it was half and half. A. It could be.

Q. What would that weigh, Mr. Moseley, would you say? A. Well, I couldn't tell you.

Q. Your best estimate? I have never had $400 to carry. A. It takes 15 or 16 to the pound.

Q. Sixteen dollars to a pound, is that right?

A. Well, I presume. [152]

Q. Well then, based on your knowledge of that fact, I would like to have you state to me, taking into consideration the silver and the currency which was in the box, how much did that weigh, your best estimate?

A. Well, it would be a guess, unless I stopped to figure it up.

Q. Well, your best guess?

A. Well, I carried that box over every morning. I know it wasn't so heavy I couldn't carry it.

Q. Well, how heavy would you say?

A. Well, I say fifty or sixty pounds.

Q. So we have the one in which you kept the crap table money weighing fifty or sixty pounds, right? A. Yes.

Q. Then there was a like box in which you stated yesterday that you had a thousand dollars?

A. Yes, sir.

Q. Half in currency and half in silver?

A. Yes, sir.

Q. Describe that box.

A. Well, that run in denominations, nickels, dimes, quarters, half dollars.

(Testimony of Ross Fred Moseley.)

Q. Describe the box to me.

A. Oh, it was the same style of box as I described before.

Q. The fishing tackle type of box? [153]

A. Yes.

Q. And in that you had $500 in silver and the balance in currency? A. No.

Q. Isn't it a fact yesterday you testified that $500 was made up half currency and silver?

A. That is the slot box.

Q. So at least you had a considerable amount of silver in there? A. That's right.

Q. What did that weigh, in your best estimation?

A. Well, around fifty to sixty pounds.

Q. That makes from one hundred to one hundred twenty? A. I didn't weight it.

Q. In addition to that we have $675 which was contained in the cash register in the grocery store and in the bar and at the lunch counter, is that right? A. That's right.

Q. Was that silver or currency?

A. That was both silver and currency.

Q. About half and half?

A. Well, that is the way is usually runs.

Q. What did you store that in at the end of the day's business?

A. Well, we have what we call a cash box for the register.

Q. And did you put all this money in the cash box? [154]

(Testimony of Ross Fred Moseley.)

A. The register cash box, that was at the end of the day.

Q. Describe that box to me.

A. Same style box.

Q. Fishing tackle style box? A. Yes.

Q. What did that box weigh when you had all this money in it, to your best estimate?

A. Well, I never weighed that. That amount of silver probably would run around 20 pounds, twenty-five.

Q. Six hundred seventy-five dollars?

A. Well, half of it would be currency.

Q. Say three hundred?

A. Well, let us make it fifty pounds.

Q. Now every morning you took 150 pounds worth of money and carried it from where you lived to that bar?

A. I didn't carry it, took it in my car.

Q. In other words, your regular practice in the morning was to take these boxes, put them in your car, and drive there and unload and put them away?

A. That's right.

Q. You don't have police protection there, do you? A. No.

Q. And yet you kept that quantity of money on those premises?

Mr. Parry: I object to that as argumentative.

Mr. Puccinelli: I think it is proper. [155]

The Court: Maybe it is argumentative. You might ask him whether or not he had police protection.

(Testimony of Ross Fred Moseley.)

Q. Did you have police protection?

A. Well, not right at the premises. Mr. Hardy was the constable up at Contact.

Q. I repeat my question. Despite the fact that Mr. Hardy was there, did you have police protection? A. Did we have police protection?

Q. Yes. A. No, not to my knowledge.

Mr. Puccinelli: That's all.

Mr. Parry: I think that is all, your Honor.

Mr. Daly: The next witness is a little out of order, but it is necessary he return as soon as he can to Elko. Call Mr. Knapp.

DALTON KNAPP

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Daly:

Q. Will you state your full name please?

A. Dalton Knapp.

Q. Where do you live, Mr. Knapp?

A. Elko.

Q. What is your business?

A. Building contractor. [156]

Q. Are you associated with a firm there?

A. Yes, Knapp Brothers.

Q. How long have you been engaged as a building contractor? A. Since 1945.

Q. Are you acquainted with Mr. Herzinger?

(Testimony of Dalton Knapp.)

A. Yes.

Q. The man sitting right behind here?

A. Yes.

Q. How did you happen to become acquainted with him?

A. Well, after the fire he came to my home and asked me to prepare estimates on the damage done to the property there at Contact.

Q. Were you familiar with this property?

A. I had never been to the site before.

Q. You didn't examine it before the fire?

A. No.

Q. Did you make some calculations as to the cost of rebuilding those buildings that were destroyed? A. Yes.

Q. And what information did you have as to those buildings when you made your calculations?

A. Mr. Herzinger supplied me with notes giving the construction of each building and I went from that. That is all the information I had, no photographs or anything to go by.

Q. Generally what type of construction was that, as far as [157] being expensive or cheap construction? A. It was very cheap construction.

Mr. Puccinelli: Objected to on the ground it is hearsay.

The Court: The answer may go out and objection is sustained.

Q. Did you make notes of your calculations at that time?

A. Well, I just had—I didn't keep any notes on

(Testimony of Dalton Knapp.)

it. It was so long ago I destroyed all the notes, but I do have the estimate to show that I prepared the estimates from.

Q. Do you know when this was?

A. Well, it was early in 1947. I don't recall the exact date. I think it was around June. I think my estimate shows June 4, 1947, when I made out the estimate.

Q. What type of construction did you estimate?

A. Well, it was mostly frame. In fact, all of it was frame construction, the cheapest type.

Q. Do you have your estimate to show and whatever notes you have with you?

A. Yes, I do.

Q. By looking at those, can you tell us what you estimated the cost of reconstructing a building, as you put it, of the cheapest type of construction, which is about dimensions 24 by 60?

A. Six thousand six hundred twenty-four dollars. [158]

Q. Does that include any plumbing?

A. That included just the notes supplied me.

Q. Can you refer to this and see if there was any plumbing in there?

A. No, it included no plumbing.

Q. Can you tell us what your estimate was for the cost of reconstructing the cheapest type of construction, a building 16 by 24?

A. Two thousand four hundred eighty-one dollars.

(Testimony of Dalton Knapp.)

Q. And then in addition to this building you last mentioned, a building 8 by 24?

A. Four hundred thirty-one dollars.

Q. And a building 12 by 12?

A. Seven hundred ninety-four dollars.

Q. And a building 14 by 24?

A. One thousand six hundred ninety-three dollars.

Q. And a building 10 by 10?

A. Two hundred eighty-seven dollars.

Q. And a canopy 16 by 16?

A. Two hundred thirty dollars.

Q. And based upon your experience, Mr. Knapp, would you say that those were reasonable figures for that type of construction at that time?

A. I would say they were very reasonable.

Q. Can you tell by looking at your notes, Mr. Knapp, whether [159] or not that included any electrical wiring, any electrical work?

A. Yes, it included electrical wiring.

Mr. Daly: That is all, Mr. Knapp, thank you.

Cross-Examination

By Mr. Vargas:

Q. May I see the document to which you are referring in connection with your testimony, Mr. Knapp?

A. Those are the notes supplied me. I based my estimate on it.

Q. These are your own notes?

A. No, those are Mr. Herzinger's.

(Testimony of Dalton Knapp.)

Q. What estimated cost per square foot did you use in determining these figures?

A. Well, I never ran an estimate on it on that basis. I actually figured the cheapest way, but in checking over they all check out pretty close, as far as the cost.

Q. Well, what does that estimate check out, cost per square foot?

A. I imagine it would run between four and five dollars.

Q. Now you say this 10 by 10 building, we had an estimate there of $287? A. That's right.

Q. So that would be $2.87?

A. Well, that is a different type building. It didn't have any finish work or anything. You would have to check over the notes and determine just what is included in that. The buildings [160] all are finished different. If the buildings were all the same construction, it would probably check out fairly close, but the buildings are not finished up the same and naturally wouldn't cost the same.

Q. As I understand your testimony, you say you had no plans or specifications of the buildings that previously existed? A. That is right.

Q. You had no blueprints? A. No.

Q. So your entire testimony then is predicated solely alone and only upon what Mr. Herzinger, the plaintiff in this case, told you?

A. That is right.

Mr. Vargas: That's all.

(Testimony of Dalton Knapp.)

Re-Direct Examination

By Mr. Daly:

Q. Just one question, Mr. Knapp. I wonder if I might have the notes Mr. Vargas is referring to and have them stapled together and marked, I believe it is Exhibit No. 7. That is all, Mr. Knapp, thank you.

WILLIAM A. KLITZ

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Parry:

Q. Will you state your full name please?

A. William A. Klitz. [161]

Q. Where do you live, Mr. Klitz?

A. Contact, Nevada.

Q. How long have you lived there?

A. Oh, approximately 12 years.

Q. How old are you? A. Twenty-nine.

Q. What is your business or occupation?

A. I am a mechanic.

Q. Where have you practiced the profession of mechanic? A. At Contact.

Q. How do you do it there?

A. Well, by doing different mechanical work on automobiles.

Q. Do you have your own place of business?

A. I have a small shop, yes.

Q. And you work for yourself?

(Testimony of William A. Klitz.)

A. That's right.

Q. How long have you conducted such work there at Contact?

A. Well, I have worked there off and on since I got out of the army, which was December, '45.

Q. You have been there rather continuously since then? A. Yes.

Q. Do you live there in the town of Contact?

A. Yes.

Q. Do you know this place called Mineral Hot Springs? A. Yes. [162]

Q. How long have you known that?

A. Well, I would say mostly since December of '45.

Q. There has been a place of business there since that time? A. Yes.

Q. Has that always been a place of business there during the 12 years you have lived around Contact?

A. Well, yes. Of course, it has been built up.

Q. You have been down to the Mineral Hot baths at times? A. Yes.

Q. Did you patronize this business that operated there in May of 1947? A. Yes.

Q. What were you accustomed to buy there?

A. Well, I bought my groceries there and a bottle of beer there too, I guess, when I thought I needed some.

Q. Was that the place where you were accustomed to buy most of your grocery supply?

A. Yes.

(Testimony of William A. Klitz.)

Q. Do you know Mr. Moseley? A. Yes.

Q. How long have you known him?

A. Why, approximately a year.

Q. Do you know Mr. Herzinger? A. Yes.

Q. On this particular day they had the fire, about what time [163] did you go there, do you know?

A. Well, I should judge around eleven o'clock.

Q. What was the purpose of your going there?

A. Well, I don't remember exactly. It seems as though I had gone there to get some motor grease.

Q. Had you ever paid any attention to that picture machine that was there in the place?

A. No. That is, I had played the machine, but I made no repairs.

Q. You had not made any repairs? A. No.

Q. What, in general, was the nature of the machine? What did it do?

A. Well, it was a coin-operated machine. After a coin was inserted it would show a movie and played music at the same time.

Q. Where was the movie shown?

A. Well, it was shown on the screen right at the machine.

Q. About how large was that screen?

A. Oh, I would say probably two by two.

Q. What was the approximate size of the whole machine, how high and how wide and how long?

A. Well, I would say probably four feet wide.

(Testimony of William A. Klitz.)

It was a rather tall affair, I would say, four feet and the width would be, I would say, four feet wide. [164]

Q. It would be about 4 feet by 4 feet by 6 feet?

A. I would say 4 feet thick.

Q. Then would be about 4 by 4 by 6 feet tall?

A. Approximately.

Q. Of what was it constructed, wood or metal?

A. Well, the case, the cabinet, as I remember, part of it was wood.

Q. And before this day had you ever looked inside of it? A. No.

Q. Where were you in the place when Mr. Nielson drove up or when you first saw him?

A. I was in the bar.

Q. What part of the bar, do you remember?

A. Well, no, I don't remember exactly. I was probably there sitting at the bar near the door.

Q. Had you driven there in car? A. Yes.

Q. I wonder if you would step down to this blackboard and familiarize yourself with the plat here where we have shown the bar room, grocery store, occupied cabin, oil house, etc. Will you take a piece of chalk and indicate by a rectangle about where you parked your car when you came in that day?

A. My car was sitting right here, right approximately in front of this oil house.

Q. Put a "K" on there. Which direction was your car headed [165] when you stopped?

A. North.

(Testimony of William A. Klitz.)

Q. You had driven in from the south from Contact? A. That's right.

Q. What kind of a car was it?

A. '31 Model A pick-up.

Q. Did you have to crank it?

A. No, it has a regular starter, just the same as any other automobile.

Q. Was the starter operating that day?

A. Yes.

Q. And then at the time you first were aware of Mr. Nielson being around there, you were sitting in the bar there on the south side of the bar room?

A. Well, I was in the bar room. I don't know my exact position.

Q. Where did you first see Mr. Nielson or his truck? A. I first saw him as he drove in.

Q. The motion attracted your attention?

A. Yes.

Q. Where did he drive first, if you know?

A. Well, right in front of the grocery store, in front of the tank.

Q. What did he do then after he drove in?

A. Well, he proceeded to pump some gas in it. [166]

Q. Did he go into the bar room then?

A. Yes.

Q. After how long a length of time?

A. Well, I don't know exactly. I wasn't watching him real close. I couldn't make an exact statement as to the time.

Q. After a few minutes was it?

(Testimony of William A. Klitz.)

A. Yes, I would say a few minutes.

Q. What did he do when he came in the bar room then? A. Why he got a bottle of pop.

Q. Now then did you see him later go out?

A. Yes. He went out to move his truck over to the tank.

Q. Where was that tank?

A. It was located between the two pumps.

Q. Did you see where he moved it?

A. No, I didn't.

Q. Were you aware of the motion of the truck out there?

A. Well, yes. I don't know as I exactly saw him move it, but the first time I saw it was in front of the grocery store and later I saw it over on the other side of the pump, so it must have been moved.

Q. Did he come back in the bar again?

A. Yes.

Q. What did he do when he came back?

A. He played that moving picture machine.

Q. Did you see him put some coins in it? [167]

A. Yes.

Q. Did you observe whether he put one or more in? A. Well, I wouldn't say. Several.

Q. Where were you when he put the coins there? A. I was seated there along the bar.

Q. And where did Mr. Nielson seat himself?

A. Well, he was on a stool, would be somewhere approximately near the middle or center of the building, probably twenty feet back from the machine.

(Testimony of William A. Klitz.)

Q. You would place him about 20 feet back from the machine? A. Approximately.

Q. Now then did you go over to this picture machine any time? A. Yes.

Q. Within what period of time after it started did you go over there?

A. Well, as I remember, it showed one complete picture and it started on the second one when this flicker appeared in the picture.

Q. What did you do then?

A. Well, there is an inspection door on the side of this movie machine and I went over and looked inside to see what was causing the flicker.

Q. Is that inspection door on the north or south side? A. Well, it was on the north side.

Q. I wonder if you would step down again to the map and let [168] us see just where that door was that you told us about. Take the chalk and draw the door in there.

A. The door was on this side, right here, be approximately here, from here back.

Q. Now when the door was opened, where were the hinges, toward the front of the building?

A. The hinges were right here when the door was open. The door turned back this way.

Q. When you got back there that machine was operating? A. Yes.

Q. What was the source of the light for the machine, do you know?

A. Well, it has a regular projector bulb in there.

Q. Is that an incandescent bulb? A. Yes.

(Testimony of William A. Klitz.)

Q. Is there a motor in there? A. Yes.

Q. When you opened the door, what did you do?

A. Well, I didn't actually do anything to the machine. I just looked through the door to determine the cause of the flickering on the screen.

Q. Could you see any cause?

A. Well, the trouble was just the fact that the film had gotton off the track.

Q. That is a regular photographic film such as run in these [169] home movies?

A. That's right.

Q. Did you put it back on the track?

A. No, I didn't.

Q. How was it operating then when you were there?

A. Well, it was operating. You see the only trouble was just this flicker on the screen. You could still see the picture but it was just rather annoying for the picture to be jumping there.

Q. Was there music playing? A. Yes.

Q. Does that machine have what we call a loud speaker? A. Yes, it had four loud speakers.

Q. What kind of music was playing, orchestra or singing?

A. Well, it was an orchestra at the time.

Q. Did you stand there watching the machine?

A. Yes.

Q. Did you watch this film? A. Yes.

Q. What did you see as you watched it there? What did the machine do?

A. Well, you mean the operation of the machine?

(Testimony of William A. Klitz.)

Q. Yes, how was it operating?

A. Well, the film, you see, it is an endless film and just keeps feeding through the projector. [170]

Q. Was it doing that properly while you were there? A. Yes, sir.

Q. Now then at that time you were back at the machine and Mr. Nielson was sitting on the stool and did you happen to observe where Mr. Moseley was?

A. You mean before I went to the machine?

Q. Well, at or about the time or when you last noticed him. A. Well, not exactly, no.

Q. Was there any one else in the bar room there, do you know?

A. There was Mr. Moseley and myself and Mr. Nielson.

Q. And any one else?

A. No, not that I remember.

Q. Then what did you first observe about this fire?

A. Well, I decided just let the machine go until we finished that picture and then shut it off. So I pulled my head out to see what everybody else was doing.

Q. Had you had your head in the machine?

A. Well, not actually in the machine, but the front of the building was blocked, due to the fact that the door opened toward the front.

Q. Did you lean over partly toward the machine?

A. Yes.

(Testimony of William A. Klitz.)

Q. You pulled back and what did you see?

A. I looked toward the front of the building and saw fire in front of the building. [171]

Q. Was anybody else in the building?

A. No, everybody else had gone and I was the last one out of the building.

Q. Was there any fire around the machine at that time? A. No.

Q. Was there any here in the bar room?

A. No.

Q. Was there any fire out in front?

A. Yes.

Q. Did you go out through that front door?

A. Yes.

Q. Was there any fire in the grocery store at that time? A. No, no fire in the grocery store.

Q. As you went out through the front door did you get burned? A. No, I didn't.

Q. Did you have a coat on?

A. No, I don't think I did that day.

Q. What kind of a day was it, do you know?

A. It was a hot day.

Q. After you went out through the front door there, what did you see?

A. Well, I saw this fire out there in front.

Q. Where was the fire as you saw it then?

A. Well, the fire was every place out there in front, across the whole front, all of the building. [172]

Q. At what speed did you go out after you saw the fire?

(Testimony of William A. Klitz.)

A. As fast as my legs would carry me.

Q. After you got outside the door, then what did you do?

A. Well, the first thing I saw that the fire had gotten such a start there was no point in trying to put it out. We didn't have any water to fight it with, so my first thought after that was to get my car out of there.

Q. Will you step down to the plat please and take this pointer and show what path you followed?

A. I came out this door and decided to get the car and came back around this building and around here back this way to the car, got in the car and started it and drove down here.

Q. You drove down sort of southerly, down the hill between the oil house and pump house?

A. Yes.

Q. When you got around to your car, did you see fire there then? A. Yes, there was.

Q. Point where that was.

A. When I got back around here where the fire was, the flames were coming over the car. In fact, it was so hot I couldn't walk right by it. I had to shield my face and arms to get up to my car.

Q. Did you run around the building?

A. Yes, I ran. [173]

Q. At any time there after you went out the front door, did you see what Mr. Nielson did at the truck?

A. Well, I didn't actually see Mr. Nielson when he drove the truck away.

(Testimony of William A. Klitz.)

Q. Did you see the truck leave or hear it?

A. No. You see, he probably moved his truck——

Mr. Puccinelli: That is objected to as not responsive.

The Court: Just testify as to your own knowledge.

Q. When you got around to your car, was his truck there?

A. No, he moved it down there where I did.

Q. Did you talk to Mr. Nielson any after the accident?

A. Well, we talked some, yes, after the accident, but I don't remember any of the conversation.

Q. Was he burned, do you know?

A. Yes, Mr. Nielsen was burned.

Q. Were you one of the party that took him down to Contact? A. No.

Q. You stayed there at the Mineral Hot Springs then? A. Yes.

Q. Some questions have been asked on cross-examination about what attempt was made to put the fire out. Was there any attempt made to put it out, as you saw?

A. Actually there was nothing we could do. There was too much fire for us to fight. We had no water to fight it with and no way to fight it, so really there was nothing we could [174] do to try to control the fire.

Q. Did you make any attempt to get anything out of the buildings or salvage anything?

(Testimony of William A. Klitz.)

A. I didn't think it was worth while. At one time we could have gotten in the back door to the bar, but were taking chances on getting out.

Q. As you judged the situation at that time, it did not seem advisable to get anything out?

A. That's right.

Q. Were you aware there was gasoline and oil and other substances around there, in and around the buildings? A. Yes.

Q. And as you ran out the door, was there fire on that canopy?

A. As I stated before the fire was all around the front of the building. That would include the canopy, near the pumps and in front of the bar.

Q. Now then as you stood there by that picture machine, were there any sparks or flame or anything of that sort?

A. No. As a matter of fact, when I left the bar the picture machine was still operating.

Q. The music was still playing?

A. Music was still playing.

Q. Did you see any fire start in that neighborhood at all? A. There was no fire there.

Q. As I understood you, there was no fire inside the building [175] at all? A. That's right.

Q. Now then, after the fire did you observe that filler pipe out there between the two pumps on the west side of the canopy? A. Yes.

Q. Was it closed or open?

A. It was open.

Q. And was there anything in it?

(Testimony of William A. Klitz.)

A. Yes, the nozzle used by the delivery truck. Nozzle and remains of the hose were there.

Q. There was the nozzle in the filler pipe?

A. Yes.

Q. And what was left of the hose?

A. Well, the only thing that was left of the hose was just the wire put inside the hose to keep it from collapsing.

Q. Where was that left with reference to that filler pipe? A. The hose?

Q. Yes.

A. I would say just back from the filler pipe.

Q. To the west?

A. Yes, it would be to the west.

Q. Was any one else with you when you noticed that nozzle wire there?

A. Well, I don't remember of anybody.

Q. Did people come around there after the fire started? [176] A. Yes.

Q. Do you recall who was the first ones that got there after the fire that you saw?

A. Well, some people from San Juacinto were the first ones.

Q. How did they arrive, if you know?

A. Well, they came in cars and conveyances to get up there.

Q. Do you now recall any names of any of them that came in that first bunch?

A. Well, I remember seeing Mr. Zilliox and Mr. Wore. Mr. Wore didn't come from San Juacinto.

Q. Where did he come from?

(Testimony of William A. Klitz.)

A. From a little ranch east called the tin mine, approximately a half mile.

Q. Did you see the trailer house burn?

A. Well, yes, I saw it burn.

Q. Did you observe how soon it caught fire after the buildings were on fire?

A. Well, it wasn't long.

Q. Was there much heat around that fire?

A. Yes, there was lots of heat. There was enough heat that you couldn't get anywhere near the fire.

Q. And that day before the fire, what kind of a day was it, just the temperature?

A. The day before the fire?

Q. No, that day on which the fire happened. [177]

A. It was a hot day.

Q. Have you any idea how hot?

A. Well, it would just be an estimate, but I would say around 90 degrees.

Q. Have you driven the road between Contact and Wells a great many times? A. Yes.

Q. Are there hills or curves on that road?

A. Yes.

Q. Do you know how high the highest altitude is that you go over coming from Wells up to Contact? A. Not exactly.

Q. Approximately, do you?

A. Well, I would say around six thousand.

Q. There are a couple of summits there, aren't there, that you go over? A. Yes.

Q. Is it generally up hill from Wells to Contact?

A. Well, yes, I would say it was.

(Testimony of William A. Klitz.)

Q. Now then how far down the road did Mr. Nielson drive his truck?

The Court: We will take our recess now.

(Recess taken at 11:50 a.m.) [178]

Afternoon Session, February 9, 1950

Presence of the jury stipulated.

Mr. Platt: If the Court please, I ask permission of the Court, on behalf of the defendant Standard Oil Company of California, to substitute for Defendant's Exhibit A, which is the wholesale distributor agreement, a photostatic copy of it and withdraw the original. I have consulted counsel and they offer no objection.

The Court: The substitution may be made.

MR. KLITZ

resumes the witness stand.

Mr. Parry: We offer Mr. Klitz for cross-examination.

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Klitz, you testified that you live at Contact? A. Right.

Q. You are a mechanic? A. Right.

Q. And you have a small shop? A. Yes.

Q. Where is the shop located?

A. It is located up in the old Contact, directly north of what is now the business.

(Testimony of William A. Klitz.)

Q. And you do work for people at Contact?

A. Yes, and tourists. [179]

Q. I believe you testified that you have known Mr. Moseley since about the summer of '45?

A. That is about right.

Q. That is when you came back from the army?

A. That's right.

Q. You stated also that you frequented the Mineral Hot Springs since 1945?

A. Well, I was there occasionally, yes.

Q. How frequent would you say?

A. Well, sometimes maybe I was there every day. It all depends on whether I needed anything from the store or if I was called there.

Q. Did you ever go down there to drink?

A. Yes.

Q. Frequently?

A. No, I wouldn't say frequently.

Q. How often?

A. Well, I would say probably twice a month, three times a month. It varied. No exact time.

Q. On the day in question you testified that you went down there about eleven o'clock in the morning?

A. That's right.

Q. And you were going to buy groceries?

A. As I remember, that was what I was going to buy.

Q. What did you buy there?

A. I don't think I had completed any transaction. [180]

(Testimony of William A. Klitz.)

Q. What did you do between eleven o'clock and the time of the fire?

A. Well, I don't exactly remember what I was doing. Nothing important.

Q. What time was the fire, to the best of your recollection?

A. Well, somewhere between twelve and one o'clock, I would say.

Q. Do you recall some of the things you did during that interval of time, an hour to possibly two hours?

A. Well, this Mineral Hot Springs was a place where people went there if they didn't have anything to do, they could go there and sit there and watch what went on if they wanted to. That is what I was doing that day.

Q. Sitting around watching what was going on?

A. That's right.

Q. What was going on?

A. Well, there hadn't been much of anything that day. It was quiet.

Q. Who was in the store?

A. Mr. Moseley and myself.

Q. Was that in the store or in the saloon?

A. That was in the bar room.

Q. Who was in the store?

A. There wasn't anybody in there that I know of.

Q. The store was left unattended?

A. That's right. [181]

(Testimony of William A. Klitz.)

Q. You and Mr. Moseley were in the bar room, is that right? A. That's right.

Q. When you went to the Hot Springs that morning at eleven o'clock, did you go directly into the bar room? A. Well, I suppose I did.

Q. Do you remember whether you did or not?

A. Well, I wouldn't say for sure that I went directly into the bar room. You could get into the bar by going into the store.

Q. Were you in the store that morning?

A. Well, I hadn't spent any time in the store. I could have passed through the store.

Q. You hadn't bought your groceries?

A. No.

Q. Where did you spend the greater part of that time, in the store or the saloon?

A. The bulk of the time I was in the bar I would say.

Q. Were you drinking? A. No.

Q. Had you had anything to drink?

A. No, that morning I hadn't.

Q. Did you have anything to drink later on that day?

Mr. Parry: Objected to as immaterial.

The Court: Objection sustained.

Q. (By Mr. Puccinelli): Did you ever buy any groceries that day? [182]

A. No, I didn't get any groceries that day.

Q. Now you described the picture machine as being 4 by 4 by 6? A. Approximately.

Q. With a screen that was approximately 2 by 2?

(Testimony of William A. Klitz.)

A. Yes.

Q. And of wood construction?

A. The cabinet of the machine.

Q. Was that the approximate location of the machine, as has been indicated on this map, that portion of it designated as the bar?

A. Yes, that is approximately the location of the machine. There is one little item here wasn't shown on this map. The ladies' and men's toilets were located right here at the rear of this building and there was a partition set right in here and the location of the picture machine was right in front of this partition, right here, that is the very edge.

Q. In other words, Dale, this picture machine was not at the extreme end of the building?

A. No, it wasn't.

Q. It was up here farther, it was beyond the partition? A. Yes.

Q. To the best of your recollection, Dale, about what time did you first see Lee Nielson?

A. Well, he came into the bar. [183]

Q. And you never saw him before that, is that right, that day? A. That day?

Q. Yes. A. No.

Q. And at the time he came into the bar, what were you doing?

A. Well, I would assume I was just sitting there at the bar.

Q. And what was Mr. Moseley doing, if you remember?

(Testimony of William A. Klitz.)

A. Well, he wasn't doing anything particular. As I say, it was a slow day and he wasn't busy.

Q. You have no recollection as to what he was doing at that time and you believe that you were just sitting at the bar? A. That's right.

Q. At that time had you had anything to drink?

A. No, I wasn't drinking that morning.

Q. Now I believe that you testified when you drove up in your car you parked it down here in front of the oil house? A. That's right.

Q. And you came from the south?

A. From the south.

Q. Going north? A. That is right.

Q. You went beyond the cabin and parked it down here in front of the oil house?

A. That's right.

Q. You had gone to the store to get groceries, hadn't you? [184]

A. Well, I didn't make a definite statement and say that I had gone there particularly for groceries that day, but I could have gone there for groceries.

Q. Do you remember why you went to the store?

A. As I said, it was a place to gather. You go there and see what is going on. If there is anything there of interest or——

Q. (Interrupting): Now, Dale, in answer to a question put to you on direct examination you were asked specifically what your purpose was in going to the store and you answered that your purpose in going there was to buy groceries.

(Testimony of William A. Klitz.)

A. Well, it could have been. That is quite a while ago. I couldn't say definitely that I did go there to get some groceries because I don't remember.

Q. In other words, you don't know why you went there, isn't that the truth?

A. No, it isn't the truth.

Q. Then why did you go?

A. Well, I could have gone there to see just what was going on.

Q. In other words, your reason for travelling there could have been attributed to one of many things—to get groceries, to visit, to sit down and see what was going on? A. That's right.

Q. And it could have been for the reason of your wanting to get a drink? [185]

A. No, as I stated before, I wasn't drinking that morning.

Q. That morning you weren't drinking?

A. That's right.

Q. Now how long did Lee Nielson remain in the bar room before he left?

A. Well, I couldn't say how long.

Q. Your best estimate?

A. Well, between probably fifteen minutes to half an hour.

Q. When did you again see Lee Nielson?

A. When he came back into the building after he moved his truck to the west side of the pumps.

Q. And it was not until he came back in that you saw him? A. That's right.

(Testimony of William A. Klitz.)

Q. When he came back in the second time, what were you doing?

A. I was still just sitting there in the bar room.

Q. At the bar?

A. Well, I wouldn't say I was at the bar. I was in the bar room.

Q. Just sitting there? A. That's right.

Q. What was Mr. Moseley doing?

A. Well, there still wasn't any customers in the building. Inasmuch as he was there to take care of customers, I don't suppose he was doing anything much.

Q. When he came back in the second time what, if anything, did [186] Mr. Nielson do, if you recall?

A. Well, he went back to the picture machine, proceeded to play it.

Q. And about what time was this?

A. Well, I don't know. I can't give you the exact time on that.

Q. Your best estimate?

A. Well, I would probably say it was 30 minutes or 40 minutes after he got there, probably forty-five.

Q. In other words, he had been there then approximately 45 minutes, is that correct?

A. That is just approximate. I don't know exactly what time elapsed.

Q. Now how long had Mr. Nielson been in the place the second time before the picture machine started to act up?

A. Well, I don't know that either. I would say approximately ten minutes, maybe fifteen, something like that.

(Testimony of William A. Klitz.)

Q. Now had you ever examined that picture machine before that day? A. No, I hadn't.

Q. Would you please explain to me again how that picture machine operates?

A. Well, it is a coin operated machine to begin with. It takes a coin to start it and it shows this picture on the screen and also has large figures inside playing music while [187] the person on the screen is doing their act, or whatever they have to do.

Q. Describe to me the mechanics, the workings of the machine.

A. OK. Inside you have the projector just like you have in a theater, just exactly the same thing, and also there is an amplifier in there that picks up your sound on the film to pass the sound to these four speakers which I said were located inside the cabinet.

Q. How does the film operate?

A. Well, the film is run through the projector just like it is in any projector.

Q. It is on a regular track?

A. Well, it runs through what is known as film track, the projector.

Q. How long did you examine the machine that day?

A. Well, I would say probably five minutes.

Q. And you were able to ascertain all this in five minutes? A. You mean——

Q. Answer my question—were you able to ascertain all that in five minutes? A. Yes.

(Testimony of William A. Klitz.)

Q. I believe you stated that you figured that the reason why the film was flickering was that it was off the track, is that correct?

A. That is what I said. [188]

Q. Now that film, being off the track, was nevertheless operating and projecting pictures which you could see, isn't that correct?

A. It was projecting pictures which you could see, but the picture had a flicker in it, that's all.

Q. But you could distinguish it?

A. Yes, you could distinguish it.

Q. In other words, your testimony on direct examination is to the effect it was just annoying?

A. That is right, it was annoying.

Q. But it was off the track?

A. That's what I stated, yes.

Q. Who was in that place at that time besides yourself?

A. Mr. Moseley, Mr. Nielson and myself.

Q. Where was Bill Hacker?

A. I don't know.

Q. Was Bill Hacker ever in that place?

A. He had been earlier in the day.

Q. Was he there during the time that Lee Nielson was there?

A. He could have been in there at the time Lee was there.

Q. Do you know whether he was or not?

A. I don't know. He had been there that morning. I had seen him that morning.

Q. Had you seen him in the bar room?

(Testimony of William A. Klitz.)

A. Yes, he had been in the bar room. [189]

Q. Now I believe you testified, Dale, that at the time you first noted the existence of any fire was when you looked up from where you were examining the machine and noticed that every one was gone?

A. That's right.

Q. Did you hear any noise? A. No.

Q. Did you hear any explosion? A. None.

Q. Did anybody utter a sound?

A. Well, they could have.

Q. Did they?

A. Could I explain it please?

Q. Yes.

A. The reason I say they could have, and also there could have been an explosion, was due to the fact that I had my head inside this machine and as you know, four loud speakers being turned up with any volume will make a considerable bit of noise themselves. That is why I say even if any one had hollered in the place I wouldn't have heard.

Q. But you had your head inside the machine?

A. Yes.

Q. Didn't you testify on direct examination, in answer to question by plaintiff's counsel to that very same question, "Did you have your head in the machine?" you said no. Wasn't [190] that your testimony, you said no?

A. I didn't tell far enough. I was going to state I put it in there so I could see.

Q. You testified on direct examination the extent

(Testimony of William A. Klitz.)

of your examination at that time was to open the door and simply look in from the outside?

A. That is right.

Q. Now for the sake of this jury and Court tell us exactly your position with reference to the opening into that machine.

A. My position, as I explained before, that door opens to the front. I was behind that door. My view of the whole front of the bar was blocked by the door.

Q. That is right, and you were removed some point away from the machine, isn't that correct, that is, your face?

A. Well, my face wasn't right up under in the machine, no.

Q. That's right. Now when you first looked up, I want you to describe just exactly what you saw.

A. Well, when I looked up I saw flames out there in front of the building.

Q. Where?

A. Coming across the windows and the door to the bar room.

Q. You saw flames coming across here?

A. That's right.

Q. Is that correct? A. That is right. [191]

Q. Did you go out that front door?

A. I went out the front door, yes, sir.

Q. Was the fire here then?

A. Yes, there was fire there. I went out through the flame.

Q. Did you get burned?

(Testimony of William A. Klitz.)

A. No, I didn't get burned.

Q. Not at all? A. Not at all.

Q. Scorched?

A. Not so it was noticeable. I say I didn't get burned or scorched that I noticed. I could have some.

Q. When you got outside, Dale, I want you to state exactly what you did.

A. What I did?

Q. Yes.

A. Well, when I got outside, I turned around and looked at the fire and made up my mind there was nothing I could do to help put the fire out because it was out of control right then, so my next thought was my car, which was parked over there in front of that oil house. Well, instead of going around the west to my car, I went around behind, due to the fact I expected an explosion because the truck was there and it was afire and everything was afire. That was my reason for going around behind the building and coming back to my car.

Q. Let me see if I understand you. Your reason for going [192] here instead of going from the south to the north in front of the building to the car, you went to the rear, was because the gas truck was on fire?

A. So it wasn't only the gas truck, it was everything else.

Q. Isn't it a fact this morning, on direct examination, you testified that you never saw that truck

(Testimony of William A. Klitz.)

until after you got behind the building to your car and saw it parked up here?

Mr. Parry: I object to that as not being in the record.

The Court: My recollection is when he got to his car the truck had been moved.

Mr. Halley: That is correct.

Mr. Wilson: I have a statement when Mr. Klitz got around to his car Nielson had moved the car north on the road.

Mr. Halley: That is right.

The Court: I don't recall myself any testimony or any statement by the witness on direct examination as to the position of the truck after he noticed the fire. There could have been, but I don't recall it.

Mr. Puccinelli: The portion of the testimony I have reference to, and this is my recollection—I realize I could very well be in error—was his testimony to the effect that when he came out of the building, he neither saw Mr. Nielson, Mr. Moseley, nor the truck. [193]

The Court: He said that when he noticed the fire in the bar room he noticed no one in there at the time. They had moved out just before he noticed the fire.

Mr. Puccinelli: For the purpose of expediting, I withdraw the question.

The Court: Is there any question about that? Isn't that your understanding of the testimony, when his attention was first called to the fire he didn't see Mr. Moseley or Mr. Nielson?

(Testimony of William A. Klitz.)

Mr. Halley: That is correct.

Mr. Puccinelli: That is correct. I withdraw the question.

Q. (By Mr. Puccinelli): Did you see Mr. Nielson when you went out? A. No.

Q. Did you see Mr. Moseley?

A. As I remember, I didn't, no.

Q. That is when you ran around the building to your car? A. That's right.

Q. Now about the time that you got here—so that I may be properly informed—did you see the truck already parked there or was the truck in motion?

A. As I remember, by the time I got back around there Mr. Nielson had already pulled the truck north on the highway.

Q. Did you see Mr. Nielson pull the truck? [194]

A. No, I did not. As I stated before, when I got back around to my car, the truck was north on the highway.

Q. And all you know is that some one moved the truck there and Mr. Nielson was simply an assumption on your part?

A. Well, he was the truck driver. It didn't move itself down there.

Q. And you simply assume or believe he was the man that moved it, isn't that a fact?

A. That's right.

Q. Now I want you to describe how the truck was burning?

A. Well, it was burning on the top, that is, at the tops of the tank, and they had some barrels in

(Testimony of William A. Klitz.)

back and that had something in them, I don't know exactly what it was, and they were burning, and also I did notice that the tires on the right rear side of the truck were afire.

Q. And other than what you have just described here, you saw no other portion of that truck burning, is that correct?

A. Yes, that is correct. Of course, I couldn't see the front of it, due to the fact the truck was facing north.

Q. Now, Dale, I believe you stated also that one of the reasons why you did not attempt to fight the fire was that there was no water?

A. Well, that's right.

Q. There was no water there for fighting fire?

A. There wasn't water there that we could get to. [195]

Q. I want to call your attention to later and ask you to state—you were present in the vicinity—when Mr. Zilliox helped put the fire out by the use of water being poured into buckets and poured on to the part that was burning?

A. Well, I suppose I was there some place. I wouldn't say I saw Mr. Zilliox.

Q. Well, if you didn't see him, just say no.

A. No.

Q. When did you next see Mr. Nielson?

A. The next time I saw Mr. Nielson was he had been fighting the fire again in his truck and he used an extinguisher that he had with his truck and the truck was still afire, so he ran back to my

(Testimony of William A. Klitz.)

pick-up, came back and asked for a shovel, and I had a short handled shovel in the back of my pick-up. He got that shovel and went back.

Q. Where was your pick-up at the time he got your shovel?

A. Parked down there by the engine.

Q. Is that the pump house?

A. Yes, that is the pump house. The engine room would be located, I believe Mr. Moseley said approximately 300 feet east of the pump house.

Q. This——

A. No, that would be north. That is the pump house.

Q. Would you come here and show us what you mean by the approximate location? [196]

A. This is the water pump house. The engine room was located approximately right here.

Q. Would you mark that, we will say "ER." Do I understand you to say that he came back and asked you for permission to use your shovel?

A. No, he didn't ask me for permission to use it. He just asked for a shovel and I had one in my pick-up.

Q. Where were you at that time when he asked you for the shovel?

A. Well, I think I was sort of east, or somewhere near, I would say, of the engine room.

Q. Who, if anyone else, did you see?

A. Right then?

Q. Yes.

(Testimony of William A. Klitz.)

A. Mr. Nielson was alone when he came for the shovel.

Q. Who, if any one else, was there with you?

A. Well, I don't remember anybody being right there with me at that time.

Q. Who, if any one else, if you recall, was in the vicinity of what was burning?

A. Well, Mr. Moseley was there and at that time I don't think any of the help was there, any people that came from San Juacinto to help fight the fire had gotten there.

Q. When did you again see Mr. Nielson?

A. I think the next time I saw him was after the fire was over. [197] Brought back after his burns were treated.

Q. Where were his burns treated?

A. Well, I don't know who treated his burns, but I heard later that he was treated at Ray King's place.

Q. Where is Ray King's place situated with reference to the Mineral Hot Springs?

A. Approximately a mile and a half south.

Q. In this direction? A. That is right.

Q. Toward Wells? A. Yes.

Q. I understood you testified that Mr. Nielson was taken down to Ray King's, had his burns treated and then came back to Mineral Hot Springs?

A. He was back there that afternoon, yes.

Q. And I believe you testified that you were able to tell or distinguish that he had been burned?

A. When I saw him again I could, yes.

(Testimony of William A. Klitz.)

Q. I want you to describe the extent to which he was burned and the location of the burns.

A. Well, his hands were burned and his face was burned. Now as to the extent of the burns, I wouldn't know about it, how to explain how bad they were.

Q. Did they impress you as being bad burns?

A. Well, yes, I would say they were bad [198] burns.

Q. Dale, when you left the place and went out the front door and down around back, was there any fire back there?

A. There was no fire back there.

Q. None at all? A. None at all.

Q. That is where you go into that underground basement?

A. At the rear of that building, yes.

Q. There was no fire there?

A. There was no fire there.

Q. And you didn't run around there until after Mr. Moseley had left the place, Mr. Nielson had left the place and you would have a chance to go outside and observe the condition of the fire and then ran and went back by yourself, is that correct?

A. That is correct.

Q. And the fire had not reached that location?

A. Well, that's right, but that didn't take me very long because I was running from the time I started.

Q. Who were the first people that you recall

(Testimony of William A. Klitz.)

coming to the scene of the fire besides yourself and Mr. Nielson and Mr. Moseley?

A. The people that came from San Juacinto.

Q. Do you remember who they were?

A. Well, not very many of them. I remember seeing Mr. Zilliox there and Mr. McLean was there too, I believe, and [199] then there was the men that were employed at San Juacinto. I can't name them because I have forgotten.

Q. Did you see Mr. Ward there?

A. His name is Wore.

Q. Mr. Wore, I am sorry.

A. Yes, I saw him there.

Q. Mr. Klitz, how long after the fire had started did you first see Mr. Zilliox?

A. I wouldn't know how long.

Q. Could you give us your best estimate?

A. Well, I couldn't give you an estimate, due to the excitement caused by the fire. Time didn't mean anything then.

Q. Were you excited at that time?

A. Sure I was excited.

Q. Excited to such an extent that your recollection as to what might have taken place may be erroneous? A. Well, no, I wouldn't say that.

Q. Not that excited?

A. That's right. Anybody is excited at a fire.

Q. When Mr. Nielson came down and asked for the shovel to help fight the fire, did you offer to help him? A. No.

Q. Why?

(Testimony of William A. Klitz.)

A. Because as I said before, I knew there was gasoline in that truck and I expected an explosion. As for myself, I thought Mr. [200] Nielson foolish to try to fight it because if it exploded he would have been killed.

Q. So you simply watched him fight it?

A. I wouldn't have got anything for it if I had.

Q. Is that the only thing that determined you, the fact that you wouldn't have got anything and the fact it was dangerous?

A. I would say it was.

Mr. Puccinelli: That's all.

Cross-Examination

By Mr. Platt:

Q. Mr. Klitz, I am interested in that movie picture machine about which you testified.

A. Yes.

Q. What was the source of power to operate that machine?

A. It was operated by electricity which was furnished by the light plant.

Q. So the electricity was furnished by the Delco light plant? A. That's right.

Q. Which furnished general electricity for the place? A. Yes.

Q. What was the construction, briefly, if you know, of the inside of that movie machine?

A. Well, I just explained that once. I can go through it again, but it would be just the same thing.

(Testimony of William A. Klitz.)

Q. Well, let me ask you this—was there any electric motor [201] on the inside of the machine?

A. Yes.

Q. And connected with that electric motor was there what we call an electrical brush, or just a brush?

A. Well, I wouldn't know whether that was the particular type motor that used a brush or not. All motors don't use brushes.

Q. Well, do you know whether there was a brush in there or whether there wasn't?

A. I don't know.

Q. In other words, there may have been or there may not have been? A. That's right.

Q. And there was some trouble with the machine —you say it went off the track and it flickered?

A. Well, the trouble was just the flicker. It made the picture jump, is all, just a jump like that.

Q. Could that have been caused by any other reason?

A. No, because the machine was operating all the time. As a matter of fact, when I left the building it was still operating.

Q. It was still operating?

A. The machine was still operating.

Q. While it was in operation, was there a light within it? A. Yes, there was a light.

Q. There had to be a light on the inside of the machine in [202] order to make the projection on the screen? A. That's right.

Q. To make it visible. So you are satisfied that

(Testimony of William A. Klitz.)

at or about the time of the fire there was a light in the machine? A. Yes.

Q. And that that light was burning?

A. That's right.

Mr. Platt: That's all.

Redirect Examination

By Mr. Parry:

Q. Mr. Klitz, this film, was it on spools and run up through the projector in front of the lens?

A. Yes.

Q. Are you familiar with these home movie projectors?

A. Well, not too familiar. I don't own one myself but I have seen them.

Q. Is this projector in the machine similar to one of those? A. Yes, it was the same.

Q. What moves the film past the lens as it shows on the screen?

A. Well, there is a crank that moves it past the lens?

Q. Are there perforations in the film?

A. Yes.

Q. Where was this film off the track? Where did it slip off, do you know? [203] Is it where that crank hit the perforations?

A. Yes, that is right. You see the crank didn't hit the film correctly, was the trouble.

Q. The motor was turning? A. Yes.

Q. When you drew that engine house, did you attempt to draw it to scale? A. No, sir.

(Testimony of William A. Klitz.)

Q. About how far was it from the pump house, if you know? Do you remember?

A. Well, I would say probably in the neighborhood of one hundred yards.

Q. After you drove your pick-up truck down there, did you go near that engine house or power house?

A. Yes, I did, I went in there and shut the plant off.

Q. What kind of a plant was it, if you know?

A. Well, the plant they had operating at that time was a Diesel.

Q. And you turned it off? A. Yes.

Q. Who is this chap Bill Hacker who is mentioned every now and then?

A. Well, I don't know him very well myself. He is just a character that has been spent some time in that vicinity.

Mr. Platt: I think that is all. [204]

The Court: Any further questions? Witness excused.

WILLIAM RAMSEY BLACK

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Parry:

Q. Will you state your full name?

A. William Ramsey Black.

Q. Where do you reside?

A. At present in Minidoka, Idaho.

Q. What is your business or occupation?

A. Railroad telegraph operator.

Q. How long have you followed that business?

A. About 22 years.

Q. By what railroad company are you employed?

A. Union Pacific.

Q. How long have you worked for the Union Pacific? A. Twenty-two years.

Q. Were you at any time located at Contact, Nevada? A. Yes, sir.

Q. During what period of time were you there?

A. About December, 1945, is the date we moved there, about three years and a half.

Q. What position did you occupy there at Contact? A. Agent.

Q. Was it a one-man station? Did you run it there? A. Yes, sir. [205]

Q. Telegraph operator and agent?

A. Yes, sir.

Q. Do you remember they had a fire there at Mineral Hot Springs? A. Yes, sir, I do.

(Testimony of William Ramsey Black.)

Q. What did you first see or know or notice about the fire?

A. The first thing we noticed—I don't recall how we were notified—we saw a great flame of smoke billowing in the air.

Q. Could you see that from your railroad station there? A. Yes.

Q. Later in the day did you go up to Mineral Hot Springs? A. Yes, sir.

Q. How did you travel? A. In a car.

Q. What kind of car did you have?

A. Ford, about '37 model.

Q. Were you alone or did some one drive with you?

A. No, my wife and two children went with me.

Q. About what time of day was it when you got up there?

A. It was approximately 6:30, in the afternoon.

Q. What had happened to the buildings there at the time you got there?

A. They were burned up.

Q. Did you stop your car?

A. Yes, sir. [206]

Q. Where did you stop it with reference to where the service station and pumps had been?

A. I stopped my car facing what had been the front of the building. In other words, front of the building and I were facing together.

Q. About how far away from the building?

A. Oh, approximately 20 feet. That would be

(Testimony of William Ramsey Black.)

hard to say definitely. I would say between 15 and possibly 20 feet.

Q. How close were you to that concrete island where the gasoline pumps were located?

A. Oh, my first estimate there, between 15 and 30 feet.

Q. Where were you from the pumps, which direction?

A. I was west of the location of the pumps, east of the pumps.

Q. How was your car pointed, in what direction?

A. Pointed facing down toward the front of the building.

Q. In an easterly direction? A. Yes, sir.

Q. Do you know Mr. Odermatt well?

A. Yes, sir.

Q. Did you see him there at that time?

A. Yes, sir.

Q. Did you observe what was around there in the neighborhood of those two pumps that had been out there at the west edge of the canopy? [207]

A. The remains of a hose was there.

Q. Did you see the filler pipe that they filled the gas tanks with? A. Yes, sir.

Q. Was that filler pipe open or closed?

A. There was some kind of cap, I couldn't tell you exactly what kind, something that hinges back, and that was up and the spout of the hose was in that filler pipe.

Q. And what else did you see beside the remains of the hose?

(Testimony of William Ramsey Black.)

A. Well, the coil wire, that part of the hose that had not burned, that and some of the fabric part of the hose. The wire in that fabric for the length of the hose.

Q. How was that hose lying there that you saw? What direction was it running, what position was it in, if you remember?

A. It was lying on an angle in relation to the building, east—oh, it was more or less north and south, maybe a 15 or possibly per cent variation.

Q. While you sat there in your car what, if anything, was done with respect to that wire coil that was in that nozzle?

A. There was something done.

Q. What was done?

A. I observed Mr. Odermatt remove the fixture from the end of that hose, the remainder of that hose, and then remove the spout from the underground filler pipe, I think the filler pipe to the underground storage tank, and then take the [208] coil wire and throw it into the burning remains of the building.

Q. Where did he throw that wire?

A. Into the burning remains of the main building.

Q. That was in what you call the basement, or something of that sort? A. Yes, sir.

Q. Did you see any one else around there at the time you saw that wire from the hose laying there?

Q. There were other people there at the time. I recall having seen Mrs. MacLean, Mrs. McLean's

(Testimony of William Ramsey Black.)

mother, I believe her name is Blethen. I saw Mr. Odermatt.

Q. What did Mr. Odermatt do with the nozzle that was in the filler pipe? A. I don't know.

Q. Did he throw that into the building?

A. I don't know. I only saw the wire.

Q. I have here a photograph which is marked Plaintiff's Exhibit 8. I will ask you first if you have seen that photograph before? A. Yes, sir.

Q. And do you recognize the objects shown thereon? A. That is the coil of wire.

Q. In what place?

A. That is down in the basement, what you described a while ago as the basement. After the entire building was burned, [209] that is what was left, just the pit.

Q. Is that a correct photographic representation of the way that wire was after it had been thrown down there? A. Yes.

Mr. Parry: We offer in evidence Plaintiff's Exhibit 8.

Q. Do you know who took the picture?

A. No, sir, I do not. It is speculation.

Q. Where did you see the picture before, do you recall?

The Court: Ask him first if he ever saw it before.

A. Yes, sir, I have seen it.

Q. Where and when did you see it before?

A. Oh, it must have been Tuesday evening I saw that picture here in Carson City.

Q. You have studied it before now?

(Testimony of William Ramsey Black.)

A. I have seen it enough to be satisfied with that is a reproduction of that scene there.

Mr. Parry: Any objection?

Mr. Vargas: May I inquire, if the Court please?

The Court: You may do so.

Q. (By Mr. Vargas): You say you saw this picture when?

A. I said I saw that picture Tuesday evening.

Q. Last Tuesday evening? A. Yes, sir.

Q. Is that the first time you had seen it?

A. That picture, yes, that is the first time I had seen that [210] particular picture.

Q. Where did you see it last Tuesday?

A. Here in Carson City.

Q. Who was present then?

A. These gentlemen who are present now.

Q. Are you referring to the three attorneys for the plaintiff? A. Yes, sir.

Q. What portion of the basement of the bar does the picture depict?

A. May I come down to the board?

Q. Yes.

A. Well, the coil wire was thrown across where I am pointing and that tallies with the position of the coil wire there.

Mr. Vargas: No further examination with reference to the foundation. We have no objection. Do you, Mr. Platt?

Mr. Platt: No, I have none.

The Court: Admitted in evidence as Plaintiff's Exhibit No. 8.

(Testimony of William Ramsey Black.)

Q. (By Mr. Parry): Mr. Black, at that time did you notice anything lying there by the pumps where the wire had been after the wire was removed?

A. Some pieces of fabric was still lying there.

Q. Did you see those lying there? A. Yes.

Q. I will ask you if you have seen this picture which I have [211] had marked Plaintiff's Exhibit 9?

A. Yes, sir, I have seen this at the same time I saw the other picture.

Q. Have you studied it?

A. Yes, sir, to the extent that I am satisfied in my mind this is the picture of those pieces of fabric.

Q. Did you see those pictures at any earlier date when they were on a smaller scale?

A. No, sir, I did not.

Q. Does that correctly portray that fabric as it was lying there after the wire had been removed?

A. Yes, sir.

Q. What object was that fabric lying on?

A. That was lying on the concrete—I can't tell you definitely whether that is the concrete island or gravel or what it is—but it is lying there.

Q. On the foundation around the pump?

A. On the foundation.

Mr. Parry: We offer in evidence Plaintiff's Exhibit 9.

Q. (By Mr. Vargas): Have you seen this Plaintiff's Exhibit 9 before?

The Court: He already testified he saw it at the same time he saw the other picture, Mr. Vargas.

(Testimony of William Ramsey Black.)

Q. Last Tuesday evening?

A. Yes, sir. [212]

Mr. Vargas: No objection.

The Court: It may be admitted as Plaintiff's Exhibit No. 9.

Q. (By Mr. Parry): Calling your attention again to this Exhibit 9, is there anything there that showed the impressions of the wire which you can point out on that picture?

Mr. Halley: Doesn't the photograph speak for itself, your Honor?

The Court: Well, the objection will be overruled.

Q. Can you point out the piece of fabric?

A. Yes, sir, I can.

Q. Show it to the jury.

A. (Indicating): The pieces of fabric.

Q. Are they lying along that sort of rough line?

A. Yes, sir.

Mr. Parry: We would like to show photographs Exhibits 8 and 9 to the jury, if we may, your Honor.

The Court: You may do so.

(Exhibits shown to the jury.)

Mr. Parry: You may cross-examine.

Cross-Examination

By Mr. Vargas:

Q. What time of day was it that you saw this smoke?

A. I don't know exactly, some time between ten and say one p.m. [213]

Q. Can you fix it any closer than that at all?

(Testimony of William Ramsey Black.)

A. No.

Q. And you say it was around 6:30 when you and Mrs. Black drove over there? A. Yes, sir.

Q. Was it dark when you got over there?

A. No.

Q. You saw several people in the vicinity?

A. Yes, sir.

Q. Mrs. McLean?

A. I recall seeing Mrs. McLean, Mrs. McLean's mother, Mr. Odermatt, and there were others, but offhand I can't recall their names.

Q. Do you recall about where you saw Mrs. McLean and her mother?

A. They were somewhere close to my car. They were parked by the side of the road.

Q. In parking your car, did you park to the east of the highway or to the west?

A. To the east of the highway, just inside the pump.

Q. In other words, you were between the highway and what portion of the front of the structure?

A. Up there approximately where that "W" is.

Q. That may be misleading because that is right on the highway. At any rate, you were between the easterly edge and the [214] highway? A. Yes.

Q. And the westerly edge is the place where the gas pumps were? A. Yes, sir, that is true.

Q. And parked in there facing east?

A. Facing east.

Q. Now you say Mrs. McLean's car was parked in there too?

(Testimony of William Ramsey Black.)

A. Somewhere in that general vicinity.

Q. Were there any other cars parked around there any place?

A. There were, but I couldn't locate them.

Q. Do you have any idea about how many?

A. I don't have any idea.

Q. And the people you observed were right around the vicinity of those cars?

A. They were more or less in the general vicinity of the buildings, what was left of the buildings.

Q. Can you name any other people that you saw there at that time?

A. Just those I named are all I can think of. My wife was in the crowd somewhere because I brought her with me.

Q. There were, however, a number of people right around that vicinity whom you can't now identify? A. Yes, sir.

Q. Now referring to Plaintiff's Exhibit No. 8, Mr. Black, it [215] appears from the center upward in that picture there is some kind of concrete blocks or something? A. Yes.

Q. What were those? A. What were those?

Q. Yes, what were these apparently concrete blocks?

A. They were part of the wall of the basement, or something like that.

Q. Can you identify that for me as to what it is?

A. Part of the building structure.

Q. What part?

A. This here is the coil wire.

(Testimony of William Ramsey Black.)

Q. I am interested right now in these concrete blocks. Would they be in the back end of the building or the front?

A. Those are limestone blocks and that is out of the building structure.

Q. What portion of the building, the front end of the bar?

A. That front portion where I indicated is where I estimated was the front of the building.

Q. Now apparently there is some kind of opening top center of this photograph, Exhibit 8?

A. That is out toward the ground. I presume that is that building.

Q. Toward the highway?

A. I think so, yes. [216]

Q. It would appear from this picture that that leads into another opening. Do you know what this other opening appears to be? A. No.

Q. There appears to be a square at the top, almost center of Exhibit 8, is that another opening?

A. I don't know.

Q. Would you say that that outlining, represented by these concrete blocks on either side of Plaintiff's Exhibit 8, represent the front of the former bar structure?

A. I would say that it does.

Q. Well, was there any excavation out in front?

A. I wouldn't know about that because I had nothing to do with the buildings. I wasn't around the place during the time they were built. I wouldn't know anything about the construction.

(Testimony of William Ramsey Black.)

Q. Did you observe that on the evening of the fire?

A. Only just a shell. The walls of the building stood as a shell and the buildings themselves were more or less a pit contained within those walls. I mean what had been the walls of the building.

Q. Now assuming that these concrete blocks that appear here are the front of the shell remaining of the bar structure, can you explain what appears to be this excavating up in this top center of the photograph? [217] A. No, I can't.

Q. Now referring to Plaintiff's Exhibit No. 9, can you tell me why there would be a very definite dark area and a light area on either side?

A. That is a shadow from those steel posts or something from the canopy. Those things are still standing and that picture was taken some time in the afternoon in order to have good light, evidently.

Q. Would you say that picture was taken looking east or west?

A. That would be taken northeast, I would say, facing northeast. I mean that would be the way the camera would be facing.

Q. Would the bottom of this picture depict at all the concrete foundation of the gasoline tanks?

A. Yes, sir, the concrete or gravel, whatever that foundation is.

Q. These gasoline pumps set on some kind of a foundation? A. Yes, sir.

Q. Does this picture, Plaintiff's Exhibit 9, depict that foundation?

(Testimony of William Ramsey Black.)

A. Yes, this part of it right here.

Q. Would you take this pen, please, Mr. Black, and trace a line across Plaintiff's Exhibit 9 and outline the portion that you believe depicts the foundation of the gas pumps? A. I can't do that.

Q. You can't pick out any portion of the foundation there at [218] all?

A. I can pick out some portion here, but I can't separate the foundation and the rest of the picture there.

Q. What portion can you pick out?

A. I can pick this out here very definitely, where these pieces of fabric are lying, absolutely.

Q. In other words, those pieces of fabric were lying right along parallel with the foundation?

A. They were lying on an angle, as I recall, something like this.

Q. On this photograph, Plaintiff's Exhibit 9, and with reference to these pieces of fabric, can you draw an outline with that pen of the foundation?

A. No, sir, I can't.

Q. Would you say those pieces of fabric, things you have indicated as being pieces of fabric, were lying along the westerly edge of the foundation?

A. Yes, sir.

Q. Or were they lying on the easterly edge?

A. On the westerly edge.

Q. And the pieces of fabric you named along a south direction, I believe?

A. Yes, sir, north-south.

(Testimony of William Ramsey Black.)

Q. Were that minor degree of variation, you say 15 degrees?

A. Something like that, yes, sir. [219]

Q. How long did you remain around there on the occasion that you and Mrs. Black were down there?

A. That would be speculative. Possibly 45 minutes to an hour.

Q. Was the fire out at that time?

A. It was still smoldering. As I said a moment ago, the basement of the main building and what had been the floors of the foundation of the other building was a smoldering pit of burning rubble and debris and various other things.

Q. Were there any explosions while you were there?

A. Once in a while you would hear a minor explosion as though some bottle broken.

Q. Who was present at this discussion last Tuesday evening with plaintiff's counsel?

A. Myself and the gentlemen, the counsel.

Q. Yourself and the attorneys?

A. Yes, sir.

Q. Any one else?

A. Mr. Herzinger was around the building.

Q. Any one else?

A. And Mr. Moseley who has testified and Mr. Klitz.

Mr. Vargas: That is all.

The Court: Any further questions?

(Testimony of William Ramsey Black.)

Cross-Examination

By Mr. Platt:

Q. Mr. Black, I understand you testified when you came up to [220] the scene of the fire on the night of May 3, 1947, with your wife, you noticed a hose lying on the ground. About where was that hose located relative to the gasoline pumps?

A. To the best of my knowledge that is west of the pump generally.

Q. I mean in common ordinary language, you would say it was located in front of the pumps?

A. Yes, sir.

Q. And did you recognize it as a character of hose usually used to fill gasoline tanks?

A. Yes, sir, I did.

Q. And about the usual length of such a hose is in the neighborhood of about 12 feet, is that correct?

A. That is what I estimated, yes, sir.

Q. Do you recall just about how long this hose was that you saw lying on the ground?

A. That was what I estimated the length to be, somewhere between 8 to 12 feet.

Q. Would it be fair to say that that hose constituted the entire length of the hose that was probably used?

A. Well, sir, as I stated before, it appeared to have some kind of a fixture on the loose end out of the filler pipe.

Q. Did you look at both ends of this hose?

A. It could be easily seen.

(Testimony of William Ramsey Black.)

Q. What was on the one end? [221]

A. There was some kind of fixture, I wouldn't know just what it was, on the outside end of the hose.

Q. What was on the other?

A. And the other end was a filler spout or whatever you call it.

Q. Then did you get the impression, or was it your opinion, that you saw the entire length of a hose used for filling gasoline tanks?

A. Yes, I saw the skeleton remains, I mean the entire length, the skeleton.

Q. Of course it is needless for me to suggest, I know, in the light of your testimony, that this hose which you saw on the ground was not connected to a truck. A. There was no truck there at all.

Q. The hose was lying by itself, disconnected from anything?

A. It was in the filler spout to the underground tank.

Q. One end in the filler spout but the other end disconnected from anything? A. That's true.

Cross-Examination

By Mr. Vargas:

Q. At the time you were down there, about 6:30 in the evening, was Mr. Herzinger there?

A. He could have been there, but I couldn't positively place him there. [222]

Q. You say that just because you don't remember?

(Testimony of William Ramsey Black.)

A. There were quite a number of people there. I can't recall all those whom I saw.

Q. Mr. Herzinger was well known to you at that time, was he not? A. Yes, sir.

Q. You knew that he operated the place that was burned and you don't recall whether or not you saw him there? A. No, sir.

Q. Did you see Mr. Lee Nielson there?

A. I don't recall having seen him there.

Q. Do you know Mr. Nielson? A. Yes, sir.

Q. Or is it simply that you don't remember whether or not you saw him there at that time?

A. I don't recall having seen him.

Q. What, if anything else, did you discover Mr. Odermatt do in or about the remains of this hose?

A. Well, that was all I observed. He moved those things and observed him throwing them actually in the burning remains of the building. What he did with this spout and other fixture, I don't know.

Q. You saw him remove the rather large fixture which was on the end of the hose nozzle?

A. Yes, sir. [223]

Q. And then you saw him remove the spout. Did you see him put the cap down over the filler pipe to the underground storage?

A. I don't know if he closed that filler cap and sealed it down.

Q. You didn't see that?

A. I didn't notice that.

Mr. Vargas: That is all.

(Short recess.)

3:15 P.M.

Presence of the jury stipulated.

The Court: Any more questions?

Mr. Parry: No more questions.

(Witness excused.)

MRS. LORETTA McLEAN

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Parry:

Q. Will you state your full name, please?

A. Loretta McLean.

Q. And where do you live?

A. I live in Twin Falls, Idaho.

Q. What do you do there?

A. I am admission clerk at the Twin Falls County Hospital.

Q. How long have you been there? [224]

A. A year and a half.

Q. Along in 1947 in May and prior to that, where did you reside?

A. At the San Juacinto Ranch in Nevada.

Q. About how far is that San Juacinto Ranch from this Mineral Hot Springs we have been talking about? A. Between six and eight miles.

Q. Is that a ranch headquarters of the U. C. Land and Cattle Company?

A. Yes, it is cattle headquarters.

Q. There are several dwellings there?

(Testimony of Mrs. Loretta McLean.)

A. Yes, there were.

Q. How long did you reside there?

A. I moved up there shortly after V-J Day.

Q. August, 1945?

A. I moved there some time during that winter.

Q. Then how long did you folks live there?

A. Until the completion of the job, around the 15th of December of '46.

Q. Of '47? A. '47.

Q. What was the job they were doing there?

A. Well, my husband was comptroller for the U. C. Land and Cattle Company and it was disposing of these lands and the partnership was dissolved at that time, was very nearly [225] dissolved and our work was completed.

Q. You broke the large holdings up into smaller holdings? A. Yes.

Q. Were there quite a few people in and around San Juacinto?

A. Oh, yes. I wouldn't want to estimate the payroll. It took one day almost to make up the payroll for the ranch for the men employed.

Q. Along in May, 1947, it was running full?

A. It was running full. San Juacinto, I think, at the time was running to capacity.

Q. Were they operating an office there at San Juacinto, with officers, bookkeeper, etc.?

A. Yes.

Q. Did you have occasion to go down to the Mineral Hot Springs from time to time prior to this fire?

(Testimony of Mrs. Loretta McLean.)

A. Oh, yes, oh, I would say maybe once a day.

Q. Was that the nearest store or bank or anything of that sort?

A. It was the nearest, yes. We had a company store, but it didn't carry anything fresh. It was all canned. No bread and things like that.

Q. You were keeping house there at San Juacinto yourself? A. Yes, sir.

Q. Did you ever notice a kerosene refrigerator sitting in the grocery department there? [226]

A. Many times.

Q. Was it operating?

A. Never, to my knowledge.

Q. Did you ever look at it particularly?

A. Yes, I was interested in buying it at one time.

Q. Was there any sign or anything on it?

A. Yes, there was a hand-made, oh, cardboard sign, with a blue figure with the price on it, saying "For Sale."

Q. And did you look it over? A. I did.

Q. Was it operating there at the time you were looking at it?

A. I never saw it operating. That is one reason I didn't buy it, I didn't know if it could.

Q. Had that been the condition for some time prior to this fire?

A. Yes, as long as I can remember ever having seen it, it was in the store and didn't operate.

Q. Was there anything in it when you looked in, do you remember?

A. Oh, there might have been. I don't recall.

(Testimony of Mrs. Loretta McLean.)

There might have been something put in out of the way.

Q. The day of the fire, what first called your attention to the fire?

A. I was told there was a fire at San Juacinto. I don't know how they called the news in to the ranch or how, but we were [227] told there was a fire and everybody go down and help with the fire.

Q. And did you go down? A. I did.

Q. How did you go, what car?

A. I drove my own car down.

Q. Did any one go with you?

A. My mother.

Q. And when you got there what was the state of the fire?

A. Well, I didn't get too close to the fire when I came up because the truck had been moved down the highway and it wasn't in flames, but it was still smoking and afire, so I parked a little distance from that and then walked up. To my recollection everything was pretty well—as far as the main part of the building—was pretty well burned.

Q. And when you were up around there some place, did you see Mr. Nielson, the driver?

A. Yes, I did.

Q. Had you known him before?

A. I don't recall knowing him particularly. The boys, Mr. Odermatt's boys, delivered butane and gasoline to us at the ranch and I knew of Mr. Nielson, but whether I knew him or not, I am not sure.

(Testimony of Mrs. Loretta McLean.)

Q. Where was he when you first saw him that afternoon?

A. He was fighting the fire on the truck. [228]

Q. How was he trying to do it?

A. To the best of my recollection he was throwing sand and they had a box full of sand. They were trying to smother it with that. I think it was the motor they were throwing it on, but I don't know much about a truck. It was just smoke and fire, that is all I know.

Q. Were there some others around assisting him?

A. Yes, there were several.

Q. Did you recognize any of them?

A. Mr. Zilliox.

Q. Do you know whether he was down at San Juacinto ranch when you were told there was a fire, Mr. Zilliox? A. I don't know.

Q. Did you see Mr. Nielson close enough to talk to him around there after you got there?

A. Yes, I took Mr. Nielson down to Contact to first aid.

Q. What was his condition when you first saw him?

A. Terribly excited and he looked badly burned. He was covered with soot and he was in a great deal of pain.

Q. He was? A. Yes, he was.

Q. Where did you observe the burns on him when you looked at him?

A. His hands and I thought his face. He was pretty badly covered, as I say, with soot and dirt

(Testimony of Mrs. Loretta McLean.)

and he complained of his [229] throat burning. I don't know how much fumes he could have inhaled.

Q. You took him into your car? A. I did.

Q. How soon was that after you arrived there that you took him?

A. Oh, time meant so little then. I would say somewhere between 10 or 15 minutes. The truck had been moved down into the sagebrush by that time. I would say about 15 minutes.

Q. Did any one go in the car with you to Contact?

A. Just my mother, who wasn't able to get in and out of the car without assistance.

Q. Did you have any conversation with Mr. Nielson? A. Yes.

Q. Did you have any conversation about the fire or cause of the fire?

A. Well, that is all we talked about.

Q. What did he say?

A. He kept saying——

Mr. Vargas: I object. There is not at this time any proper foundation laid.

The Court: Objection overruled. Answer the question.

A. He kept saying over and over again, "This is terrible. I never should have gone inside."

Q. And then did you stay with him down at Contact while his [230] burns were dressed?

A. Yes, I did, but there is an R.N. at Contact, that is why I took him down there, and I didn't go with her while she dressed the burns.

(Testimony of Mrs. Loretta McLean.)

Q. Who was this R.N.? Is that registered nurse?

A. Yes.

Q. Who was she? A. Frances King.

Q. Did you notice where she dressed his burns?

A. Well, afterwards, yes. She had dressed around his face and his hands and had given him something to drink, something she thought would be soothing. I don't know enough about medicine, but it was a tallow content or something to help his throat, and suggested he go to the doctor and hospital.

Q. Were his hands bandaged?

A. Not that I recall. I think she put this salve they use for burns to cover, to keep the air out. I don't believe they bandage burns.

Q. Then where did you take him?

A. I took him back.

Q. To the Hot Springs?

A. To the Hot Springs.

Q. And where did you leave him?

A. Just around the premises some place.

Q. Were you around there again in the evening when Mr. Black [231] was there?

A. Yes, I was.

Q. Do you recall that you saw Mr. Black there or not? A. I recall him.

Mr. Parry: You may cross-examine.

(Testimony of Mrs. Loretta McLean.)

Cross-Examination

By Mr. Vargas:

Q. Mrs. McLean, did you ever see this refrigerator that you say was in the store with the For Sale sign on it, at any other location than that in the store?

A. Not that I recall. I never was interested in it until I knew it was for sale. I don't recall having seen it any place before that.

Q. Over what period of time had you observed the refrigerator in the store?

A. I would say prior to the fire at least two or three months.

Q. And all during that time you say it had a sign, "For Sale"?

A. It had a sign on it, "For Sale."

Q. Do you recall how long it was before the fire that you first took a look at it?

A. No, I wouldn't know. It must have been quite some time before the fire because I returned to the ranch in September the year before and when we were rebuilding, I was interested in the refrigerator. I think I bought a refrigerator in January of that year or December, so it was prior to that. [232]

Q. You bought a refrigerator in January or December of what year?

A. Well, December of '46, it would be.

Q. Prior? A. And January of '47.

Q. December prior to the fire?

A. So it would have been a long time.

(Testimony of Mrs. Loretta McLean.)

Q. So at the time you bought your own refrigerator you had no further interest in the purchase of the refrigerator? A. No.

Q. Were you down at Mineral Hot Springs the day of this fire prior to the time you went down after the fire started? A. No, sir.

Q. Do you recall if you had been there the day before? A. No, I can't recall that I had.

Q. You say the company store at the ranch didn't carry anything fresh? A. No.

Q. And it was your practice to get your fresh vegetables at the Hot Springs?

A. Oh, occasionally the ranch got in fresh vegetables, but usually just celery and lettuce and that is about all, and if you wanted anything out of the usual line, you were expected to get it for yourself, which we did.

Q. Now I believe you testified that you didn't actually know [233] what part of the truck was burning when you saw Mr. Nielson?

A. No, I don't know. It seemed to me there was smoke coming from all over, but I don't know enough about a truck to know what could be burned.

Q. Did you go on by the truck at that time?

A. Not until after it had been moved from the highway. I was afraid of it.

Q. After it was moved?

A. Yes, it was moved and I don't know whether it was driven or pushed off. It was moved off the highway into the sagebrush.

(Testimony of Mrs. Loretta McLean.)

Q. And at that time you and Mr. Nielson went on to Contact? A. Yes.

Q. And following this Mr. Nielson returned with you to the Hot Springs? A. Yes.

Q. About how long did you stay around Hot Springs after returning from Contact?

A. I don't recall after I left my mother at Contact when I took Mr. Nielson back and had to go back after her and then stop by again or not. I know I was there three or four times during the day by going back and forth up to Contact.

Q. When you were there at the time Mr. Black was there the late part of the day, did you see Mr. Nielson then?

A. No, I don't recall seeing Mr. Nielson [234] then.

Q. Do you recall having seen Mr. Nielson on any of the occasions that you returned to the Hot Springs after your trip back from Contact?

A. No, I don't recall seeing him after I took him back.

Q. He may have been around there?

A. He may have.

Mr. Vargas: That's all.

Mr. Platt: No questions, your Honor.

Witness excused.

MRS. KATHERINE RICHARDS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Parry:

Q. Will you state your full name please?

A. Katherine Richards.

Q. Where do you reside?

A. Contact, Nevada.

Q. How long have you been in and around Contact? A. Thirty-one years.

Q. Do you recall they had a big fire down there at the Mineral Hot Springs? A. Yes, I do.

Q. Where were you in the early part of the day?

A. I was at Ray King's service station.

Q. Where is Ray King's service station in Contact? [235]

A. Right in Contact, just opposite the Maintenance Department.

Q. That is the Highway Maintenance?

A. Yes.

Q. About how far is that from Mineral Hot Springs? A. About a mile and a half.

Q. What were you doing there at Ray King's that day? A. I was working there.

Q. Are you related to the Kings in any way?

A. Yes, I am.

Q. What is the relationship?

A. Mrs. Ray King is my sister.

Q. And on that day did you see Mr. Nielson in a gasoline truck? A. Yes, I did.

(Testimony of Mrs. Katherine Richards.)

Q. Had you known Mr. Nielson before that?

A. Yes.

Q. He made deliveries of gasoline there at the King station? A. Yes.

Q. Where was he when you first saw him that morning?

A. Well, when he pulled the truck in from Wells to make a delivery and at the time he pulled the truck in we had quite a few cars at King's station and he said, "Well, if you are busy we will go on down to the Mineral Hot Springs and pump."

Q. What time of day was that?

A. To my estimation it was some time during our noon hour. [236]

Q. What kind of a day was it, cool or hot?

A. Very hot day.

Q. Did you notice his truck whether or not it was warm when he pulled in?

A. No. I didn't. He stopped at kind of a rock railing outside the place, stopped at the edge of that.

Q. And then what did he do, if you know, after he spoke to you?

A. He got in his truck and went down to make his delivery to Mineral Hot Springs.

Q. What did you next notice?

A. I was servicing a car and happened to be looking around and saw this big cloud of awful black smoke and rather brilliant red flame over the surface and I told my sister, I said "Mineral Hot Springs is on fire." She said, "How do you know?"

(Testimony of Mrs. Katherine Richards.)
I said "I just saw the smoke" and she ran out and saw the smoke.

Q. After that did you see Mr. Nielson there at the King Service Station? A. Yes, I did.

Q. Who brought him down?

A. Loretta McLean.

Q. What condition was he in when you saw him?

A. He was quite excited and pretty badly burned.

Q. And this nurse, is she related to you?

A. She is my niece. [237]

Q. Did you have any conversation with Mr. Nielson there?

A. The only thing that was said outside of the nurse taking care of his burns, we asked him what was the cause of the fire and he said it had to be the fault of the truck.

Mr. Parry: You may cross-examine.

Cross-Examination

By Mr. Vargas:

Q. I take it, Mrs. Richards, that you yourself didn't witness any delivery of gasoline at Mineral Hot Springs?

A. No, I never was even there. Wasn't to the fire, never saw any part of the fire.

Mr. Vargas: That's all.

Mr. Platt: No questions.

Witness excused.

EDWARD HERZINGER

being duly sworn, testified as follows:

Direct Examination

By Mr. Daly:

Q. Will you state your full name?

A. Edward Herzinger.

Q. Where do you live, Mr. Herzinger?

A. Buhl, Idaho.

Q. You are the Mr. Herzinger that has been referred to as the owner of Mineral Hot Springs, is that right? A. Yes sir.

Q. I might ask you, Mr. Herzinger, how many service stations [238] there are between Wells, Nevada and Rogerson, Idaho?

A. At that time there were just two.

Q. And what were those two?

A. Ray King's and mine.

Q. Do you know how far it is between Wells and Rogerson, approximately?

A. Thirty-five miles from Rogerson into my place and 52 miles from my place to Rogerson, making approximately 87 miles.

Q. How long have you owned Mineral Hot Springs?

A. Since the latter part of February, '46.

Q. And are you operating under an agreement with the Standard Oil Company of California?

A. I am.

Q. At the time you purchased Mineral Hot Springs, Mr. Herzinger, was it operated under a dealer agreement, or any other agreement, with the Standard Oil Company of California?

(Testimony of Edward Herzinger.)

A. Yes sir, I was told it was under a dealer's agreement.

Q. And have you been operating under an agreement with the Standard Oil Company of California ever since you have owned the place?

A. I have.

Q. I hand you what has been marked Plaintiff's Exhibit 10 for identification and I will ask you if that is the agreement under which you were operating the Mineral Hot Springs on May 3, 1947?

A. That is a photostatic copy of the agreement they mailed to [239] me from Salt Lake City.

Q. Are you named as a party to that agreement?

A. Yes, sir.

Q. Will you look at it again?

A. I have had several agreements.

Q. Mr. Herzinger, who is O. J. McVey?

A. He was the one who started that place, as near as I recall. He started the service station and store and operated it for some ten years.

Mr. Daly: We will offer this photostatic copy in evidence.

Mr. Platt: If your Honor please, I do not think I have any objection except I would like to look at it to see that it is the same agreement. Your Honor please, we stipulate that this photostatic copy may be admitted.

Mr. Daly: I wonder, Mr. Platt, if it may also be stipulated that the plaintiff has been assigned the interests of O. J. McVey in this dealer agreement?

Mr. Platt: Well, we will stipulate to that, with

(Testimony of Edward Herzinger.)

the proviso to get a counter stipulation that at the time of the fire Mr. Herzinger was the owner of, in possession of, and had title to the property involved in this litigation. I make this suggestion in order to save time in the introduction of documents.

The Court: This suggestion is acceptable? [240]

Mr. Daly: It is acceptable. The title of the plaintiff, however, is subject to a prior lease to the Standard Oil.

Mr. Platt: There again the relation between Standard Oil and this plaintiff is a reciprocal relation. Standard Oil leases to him and he leases to Standard Oil under certain conditions and covenants and I think there is no materiality to that, as far as the case is concerned, but I can only stipulate to the facts that the written document show. There isn't any doubt but it was a reciprocal lease arrangement between Standard Oil and this gentleman with respect to the matters involved.

Mr. Daly: If the Court please, if Mr. Platt has in his possession the originals of the agreements relating to the purpose, I would suggest that they be introduced to show just what this relationship is. Unfortunately we are limited to photostatic copies which were furnished by Standard Oil. We don't have the original.

Mr. Platt: Well, we have the original of these documents and we have no objection to submitting them or having them admitted in evidence. Well, we have no objection to the admission of the photostatic

(Testimony of Edward Herzinger.)

copy of the agreement between O. J. McVey and Standard Oil Company of California of date June 3, 1941.

The Court: That is marked Exhibit 10. It may be admitted.

Mr. Platt: I wish you would bring out, in order to [241] save time, that this lease to McVey was subsequently assigned to Brown and subsequently assigned by Brown to Mr. Herzinger, this dealer's agreement that has just been offered in evidence.

Mr. Daly: I will stipulate to that. I do not think this witness knows what happened before he got there, but we will stipulate that this is a fact.

Mr. Platt: Well, I assume this witness, his obligations under the lease, were obtained by an assignment.

The Court: Wouldn't it be well if this stipulation was stated in its entirety here now to clear the record? Do you want to restate this stipulation so it will appear clearly in the record?

Mr. Platt: Yes, your Honor. I offer to stipulate that the exhibit, namely the dealer's agreement, between Standard Oil and McVey, was later assigned to Brown, by Brown later assigned to Mr. Herzinger and at the time of the fire on May 3, 1947, Mr. Herzinger was operating under that dealer's agreement.

Mr. Daly: We will so stipulate. Thank you, Mr. Platt.

Q. Mr. Herzinger, what was located at Mineral Hot Springs prior to the fire, immediately prior to

(Testimony of Edward Herzinger.)

the fire? A. You mean in line of buildings?

Q. Yes, what did you have there?

A. I had a bar room, had a grocery store along the highway and a cabin on the highway, oil house and pump house. Right behind [242] that had two cabins and north of them I had what I call a power house, where the light plant was. About a quarter of a mile east of there was five cabins, five bath houses under one roof, wash house, coal house, gas pumps. That is about all.

Q. Now, Mr. Herzinger, have you looked at this little sketch there Mr. Moseley drew on the blackboard? A. Yes, I did.

Q. I ask if that represents all of the buildings which were destroyed by the fire?

A. Yes, it does, all on the highway there.

Q. Then these two cabins that you spoke of in the rear, the power house and five cabins and five bath houses, they weren't damaged by this fire?

A. No, they weren't.

Q. How did you hear about the fire, Mr. Herzinger?

A. I happened to be in Elko at that time, was on my way back to Mineral Hot Springs, and I stopped at Wells on the way and I met a party in Wells that I knew from Buhl and he asked me if I knew the Mineral Hot Springs had burned down.

Q. When was this?

A. Do you mean what time of the year?

Q. Was it the day of the fire or next day or when? A. Well, that was the day of the fire.

Q. Do you know about what time of day?

(Testimony of Edward Herzinger.)

A. I must have got to Wells, as near as I can recollect, around [243] two o'clock, in the afternoon.

Q. What did you do then?

A. I immediately went across the street to a place they call the Monte Carlo and tried to telephone down there. I tried and tried and finally central told me they couldn't make the connection.

Q. So you didn't complete the call?

A. No.

Q. What did you do then?

A. I jumped in my car then and took off for the place.

Q. Do you know what time it was that you arrived there, about?

A. Oh, I would say possibly four o'clock. It might have been a little sooner than four o'clock. I can't recollect how long.

Q. Was this the same day as the fire?

A. Yes, it was.

Q. What did you find when you got there?

A. Well, there was nothing left of the buildings along the highway, a bunch of smoldering ashes, remains of what the buildings had been, just smoldering.

Q. Does this sketch that Mr. Moseley drew accurately represent the overall dimensions of the buildings shown on here? A. Yes, it does.

Q. As they were prior to the fire? A. Yes.

Q. Handing you, Mr. Herzinger, what has been marked Plaintiff's [244] Exhibit 7 for identification,

(Testimony of Edward Herzinger.)

being a number of sheets of paper, I will ask you what those are?

A. It is a list of all——

Mr. Platt: I don't identify this exhibit by this number. May I look at it?

A. This is a list of the buildings, their size and the structure they were built out of.

Mr. Platt: May I inquire, your Honor, who made out that list and when it was made out?

A. You mean these sheets I am holding in my hand?

Q. (By Mr. Platt): Yes.

A. I made them out myself.

Q. When was it made out?

A. Oh, shortly after the fire.

Q. About how long?

A. I would say within thirty days.

Mr. Platt: That's all.

Q. (By Mr. Daly): Does the description and the dimensions shown on those sheets of paper accurately represent the buildings which were destroyed by the fire?

Mr. Platt: Just a minute before he answers. May I inquire a little further?

Q. (By Mr. Platt): Have you any plats or maps or builder's contracts or blueprints which indicate with some degree of accuracy the nature and character of those buildings? [245]

A. No, sir, I haven't.

Q. Mr. Herzinger, at any time did you take any

(Testimony of Edward Herzinger.)
measurements of these buildings, that is prior to the fire? A. Yes, sir, I did.

Q. When did you do that?

A. Oh, I would say it would be shortly after I bought the place.

Q. How long ago was that?

A. Well, that would have been possibly the early part of '46.

Q. Did you make up this memorandum from the measurements which you took them?

A. I remember the measurements of the buildings.

Q. Then it is fair to say, isn't it, Mr. Herzinger——

Mr. Daly: If the Court please, isn't this cross-examination?

The Court: Well, the exhibit is offered. What is the purpose of that?

Mr. Daly: The purpose, if the Court pleases, is to show the basis for the testimony of Mr. Knapp, in which he stated the valuations he placed on reconstructing these buildings.

The Court: It seems to me that this examination then would be in order. You may proceed.

Q. (By Mr. Platt): What I am trying to get before the Court and jury, if I can, is the best evidence. [246]

The Court: What I understood you are trying to do is to determine whether or not you are going to make an objection to this exhibit?

Mr. Platt: That's right.

(Testimony of Edward Herzinger.)

The Court: If he makes an objection—isn't he trying to find out the source of the information in this exhibit?

Mr. Parry: If that is so, we have no objection.

The Court: That is your purpose, isn't it?

Mr. Platt: Yes.

The Court: Go ahead.

Q. (By Mr. Platt): It is fair to say then, Mr. Herzinger, that this proposed exhibit here was made by you wholly from recollection?

A. Well, partly from recollection and partly from figures. I had my previous measurements.

Q. Where are those original figures?

A. I have them at home. I don't have them with me.

Q. They are at home, is that true? A. Yes.

Q. And they are available?

A. I think they are.

Q. At what place do you call your home now?

A. That would be on my ranch south of Buhl.

Mr. Platt: We object to the offer, if the Court please, on the ground it isn't the best evidence.

Mr. Daly: I might ask a question to try to clear this up.

Q. (By Mr. Daly): Mr. Herzinger, you were in these buildings a great many times, were you not?

A. Yes, I was.

Q. And you were familiar with the size of those buildings? A. Yes, sir.

Q. You became familiar with them?

A. Yes, sir.

(Testimony of Edward Herzinger.)

Q. How long had you owned this property?

A. Ever since the latter part of February, '46; a little over a year before the fire.

Q. From your observations and your experience in being inside of these buildings, do you know what the size of these buildings were?

A. Yes, I do.

Q. And this Plaintiff's Exhibit 7, was this made from your knowledge thus obtained?

A. Well, I knew the size.

The Court: Is this the memorandum the contractor used to make his estimate?

Mr. Daly: That is correct.

The Court: Objection will be overruled. It may be admitted [248] in evidence. No. 7.

Mr. Vargas: May the record show, if the Court please, an exception to the Court's ruling?

The Court: You may have an exception.

Q. (By Mr. Daly): Mr. Herzinger, did you give these sheets of paper, being Plaintiff's Exhibit 7, to Mr. Dalton Knapp of Elko for the purpose of his making an estimate for rebuilding those buildings? A. Yes, sir, I did.

Q. Now to get back, Mr. Herzinger, to the day of the fire. What did you do when you arrived at Mineral Hot Springs that evening?

A. Well, there wasn't much I could do. Drove up there and parked my car and started to talk with the people there, tried to find out what the cause of the fire was.

(Testimony of Edward Herzinger.)

Q. Do you remember who was there, who you talked to?

A. There were quite a few people there. Just off-hand—my help that was working there.

Q. Who would that be?

A. Mr. and Mrs. McLean—I couldn't say about Mr. McLean, I know Mrs. McLean was there down by my cabin. I spoke to her. Mr. Odermatt was there and there were people there from San Juacinto, but I wasn't acquainted with them. The helpers around there were around the premises there too.

Q. Referring to this sketch, Mr. Herzinger, that Mr. Moseley [249] drew, can you tell us whether or not these lines along the south side of what is called the bar room properly show the bar room? Is that about right? A. That is about right.

Q. And the lunch counter is the line immediately on the east? A. That is right.

Q. And what is up here in the southwest corner of the bar?

A. There was a small cigar and candy case right there.

Q. Does it go right up against the west wall of the bar?

A. Yes, it did, the candy case went right against the wall.

Q. The opening then——

A. Is between the candy case and the bar.

Q. What about the cooling machine, Mr. Herzinger? What refrigeration did you have on these

(Testimony of Edward Herzinger.)

premises? A. I had one in the bar room.

Q. What kind was it, Mr. Herzinger?

A. It was about a 24-foot electric refrigerator.

Q. Where was it located?

A. That was located against the wall there, between the two long bars that you see on the south side.

Q. South side of the bar room? A. Yes.

Q. Did you have any other refrigeration, cooling machines?

A. I didn't have any other in use. I had an old one that I [250] had back in the corner by the candy case and when I put this one in I moved it over in the corner of the room to get it out of the way.

Q. Is this the kerosene or coal oil one we have heard so much about?

A. Yes, a kerosene refrigerator.

Q. You say the one you had in the bar was the only refrigerator, cooling machine, in operation?

A. That's right.

Q. This kerosene refrigerator, Mr. Herzinger, was it operating at the time of the fire?

Mr. Halley: How does he know? He wasn't there.

A. It has never been in operation——

Mr. Daly: I will withdraw the question.

Q. Do you know, Mr. Herzinger, whether or not the kerosene refrigerator was in operation on the day of the fire?

Mr. Puccinelli: The same question; objected

(Testimony of Edward Herzinger.)

to on the same ground—contrary to the evidence. He says he wasn't there.

The Court: I don't see much sense in asking the question if he wasn't there before the fire, but he can answer it.

Q. I just asked if you knew, Mr Herzinger.

A. Being I wasn't there, I couldn't swear to it, but it hasn't been.

Q. That's fine. Now did you have any ice box?

A. I had a box, possibly, oh, 20, between 20 and 25 foot ice box in what we call the lean-to back of the grocery store.

Q. Did you have any other iceboxes?

A. A large box underneath the beer counter, the back of the bar.

Q. The beer counter is part of this bar, is that right?

A. It wasn't part of the bar. That cooler is separate from the bar.

Q. But what about this beer counter you spoke of?

A. I mean the bar, that is what I mean. This cooler was underneath that and beside that was a small Coca-Cola box. It wasn't an ice box. We used ice in it.

Q. This kerosene refrigerator, Mr. Herzinger, you say it had been in the bar?

A. It had been in the bar when I first bought the place.

Q. Do you know about when it was moved?

(Testimony of Edward Herzinger.)

A. I would say some time about the middle of the summer, as near as I can recall.

Q. Middle of the summer of what year?

A. Of '46. Just as soon as I bought my electric refrigerator, I moved it out. That was the reason for buying the electric. I bought the place with what you might call no refrigeration.

Q. Did you make a sign of any kind and place on the refrigerator? A. Yes, I did. [252]

Q. What did the sign say?

A. I first put a sign up and hung it on the door handle of the refrigerator, $150, and it didn't sell for that so later on in the winter, or possibly around New Year's, I took that sign and put another one, $100, and it still didn't sell, still was in the grocery store.

Q. So far as you know, Mr. Herzinger, from the time the refrigerator was moved into the grocery store, was it ever in operation?

A. As far as I know, it never was. It was just stored there among the rest of the boxes.

Q. Now, Mr. Herzinger, after this fire did you make an attempt to determine what property you had, other than buildings, which were destroyed by the fire? A. Yes, I did.

Q. And did you make a list of those items?

A. Yes.

Q. And when did you make the list?

A. Oh, approximately within a week after the fire.

Q. Do you have that list? A. Yes, I have.

(Testimony of Edward Herzinger.)

Q. Do you have it with you? (Witness produces paper.) Did you also at that time estimate the value of the different items? A. Yes, sir, I did.

Q. And I will ask you, Mr, Herzinger, if you have had experience [253] in buying and selling items such as those which were in it and lost by the fire?

A. I have had about ten years' experience buying and selling equipment of that kind in various places.

Q. When did you prepare that list, Mr. Herzinger?

A. Oh, possibly within a week after the fire.

Q. And by refreshing your memory from that list, can you tell us what property you had in or about the buildings which was destroyed by fire and your best estimate of the value of that property?

Mr. Puccinelli: Any testimony of that will be objected to. Might I inquire just one question?

The Court: Yes.

Q. (By Mr. Puccinelli): From what source did you get the information contained on that list?

A. From my knowledge of knowing what the value of these different items were.

Q. Were you there the day of the fire?

A. Yes, sir.

Q. Prior to the fire had you made an inventory of what you had on the premises?

A. No, I wasn't there prior to the fire. I was there after the fire.

Q. Then from what information or source did

(Testimony of Edward Herzinger.)

you get the information as to commodities which you lost in the fire? [254]

A. Well, I practically moved all these items into that place, outside if they were in there when I bought from Brown.

Q. That was in what year?

A. That was in '46.

Q. 1946? A. Yes.

The Court: What is the question?

(Last question by Mr. Daly read).

The Court: Do you make an objection to the question?

Mr. Puccinelli: I am simply attempting to ascertain whether or not he made this from his own recollection or was assisted by any one in making it?

The Court: I think you can bring all that out on cross-examination of the witness, Mr. Puccinelli.

Mr. Daly: Now do you know what the question is, Mr. Herzinger?

(Question read.)

A. Yes, sir, I can.

Q. Will you do that for us? Just take the separate items.

A. You mean all the items I have here and their value?

Q. Yes.

The Court: That isn't the question.

Mr. Halley: I think we are entitled to examine on the list, how it was made.

The Court: I don't believe his interpretation of the question is correct. Let us get the question. [255]

(Testimony of Edward Herzinger.)

(Question read.)

Mr. Halley: The witness now proposes to read from the list, your Honor, and we object to that without having the privilege of knowing from what information he made the list.

The Court: I think so. Go ahead, Mr. Puccinelli.

Q. (By Mr. Puccinelli): What was the source of information you had in the preparation of that list? A. From my knowledge.

Q. Do you know of your own personal knowledge that at the time the fire started at Mineral Hot Springs that every item contained on that list was absolutely in or about your premises?

A. It has always been there. I don't see——

Q. I asked you, Mr. Herzinger, if you know, of your own personal knowledge, that between the hours of twelve and one o'clock on the 3rd day of May, 1947, every item contained on that list was in your premises at Hot Springs?

The Court: I think before going into the question of value, wouldn't it be better to find out from the witness what was in the place? That might simplify this situation. It is a double question.

Q. (By Mr. Daly): Will you tell us then, Mr. Herzinger, what items of personal property were in and around the premises at the time of the fire?

Mr. Puccinelli: Same objection. He can't testify to that; he wasn't there. [256]

The Court: Well, he generally knows the place

(Testimony of Edward Herzinger.)

and we have testimony in the record he was there once a week. I wouldn't entertain an objection on that ground. Let us go ahead.

Q. Read just the items.

Mr. Vargas: Again apparently this memorandum is going into evidence, reading from the items. As I understand, this memorandum was prepared by this witness and not from any information or record kept, but solely his own recollection, and I submit his use of this memorandum, under the circumstances, is that of self-serving document. The proper foundation has not been laid for the use of the document and I object on that ground. If he has an independent recollection, he may advise what was there.

The Court: What is the question?

Mr. Daly: I will withdraw that question.

Q. (By Mr. Daly): I wish you would tell us, Mr. Herzinger, what items of personal property were in and around the premises at the time of the fire.

The Court: Tell us without that document.

A. It is two years ago. It is hard for me to remember all of them.

The Court: Do the best you can, Mr. Herzinger.

A. I know there was a candy case and cigar case combined. Then there was a large back bar with mirrors in it. [257]

Q. Wait a minute—candy case and what?

A. Candy case and cigar case combined.

Q. What was the next item?

(Testimony of Edward Herzinger.)

A. A back bar with large mirrors. There was a front bar.

Q. How long was this back bar, if you remember? A. Approximately 20 feet.

Q. And the candy case and cigar case?

A. The length of that?

Q. Yes. A. Approximately five feet.

Q. And the front bar, how long was it?

A. That is twenty feet. And underneath that front bar was a cooler that held 25 cases of beer, had a large three-compartment and stainless steel sink for washing glasses; and a large electric refrigerator, 25-foot size.

Q. Is that 25 cubic feet? A. Yes, sir.

Q. What make was it, if you remember?

A. I just couldn't tell you what make that was. Then there was a small Coca-Cola cooler for ice. There was a 20-foot lunch counter and there was a butane gas stove in the lunch room. Then there was a 3-compartment sink there for washing dishes and there was two tables back of the lunch counter that we used to work on and there was a cash register back of the lunch counter and a cash register back of the large bar that I mentioned [258] a little while ago. And there was possibly fifteen large pictures of scenery that I had painted and hung on the wall.

Q. How large were those pictures, do you know?

A. Possibly two feet by three feet, to my best recollection. And there was eight deer heads mounted deer heads, on the wall. There was nine of these—I would call them overstuffed—stools, high

(Testimony of Edward Herzinger.)

stools, at the bar, with padding on the top. There were four of them high stools without any padding, just wooden stools. There was a panarama picture machine I had in there and I had a piano in there. There was a large bench that I had along the wall there, kind of a leatherette bench for people to sit on. There was a 21 table there that they played 21 on, and then there was a poker table there, and a round dining room table, about six chairs.

Q. What were those, just straight chairs?

A. Just ordinary wood chairs, yes. Then there was a two-burner fuel oil stove.

Q. Was that a heating stove?

A. Yes. There was a crap table there. There was a luminal lighting fixture above the crap table, and Wurlitzer music machine; four slot machines.

Q. What denomination were those machines?

A. Five cent, ten cent, a twenty-five cent and a fifty cent. Then a bench where these four slot machines set on top. [259]

The Court: We will take a recess now until 10:00 o'clock tomorrow morning.

Friday, February 10, 1950, 10:00 A.M.

(Presence of the jury stipulated.)

(All attorneys present.)

EDWARD HERZINGER

resumed the stand on further

Direct Examination

By Mr. Daly:

Q. The last item I believe you mentioned, Mr. Herzinger, was the bench under the slot machines. Now can you go on from there and give us some more of the items which were in the building? I notice that most of these items apparently are in the bar room. Perhaps it would be clearer to all if you gave the rest of the items in the bar, as well as you remember.

A. Well, had cooking utensils and silverware and dishes. Had an electric mixer there. Had a stapler, had a panarama kit, two toilet fixtures, some tapestry and Christmas decorations; a safe——

Q. Just a moment—now if you will proceed please.

A. And one lavatory and a towel cabinet; one burglar alarm system; complete set of fire extinguishers; about six panarama films; a two-wheel beer cart; beer glasses and glasses of all sorts used in connection with the bar. Then there was the grocery counter——

Q. You are now going into the grocery store?

A. The grocery store. [260]

Q. What type of counter was that, Mr. Herzinger? A. What was it made out of?

Q. Yes, do you know about how big it was or what it was made of?

A. It was a wooden counter, possibly 18 feet long.

(Testimony of Edward Herzinger.)

Q. That is the grocery counter?

A. Yes. And there was the back grocery counter with its shelves and drawers all complete, and a grocery scale; that used kerosene refrigerator. Back in that lean-to we had a large ice box, two cream cans; flood light bulbs for flood light outside; also colored bulbs for identification when you went out to the canopy. Back of the oil house there was two barrel pumps, one air pressure, a large vise; two hydraulic jacks; an assortment of tools; a vulcanizing set; also two gas lamps—possibly in the other part of the building. Now going back to the cabin, there were two bed springs and mattresses, also bedding; there were two alarm clocks; one fuel oil stove; there were two coal stoves—they weren't in the cabin, they were in another part. There was also about $400 worth of personal belongings of various kinds in that cabin. I had a half-horse compressor in that ice box.

Q. That was in the basement?

A. That was down the basement, yes.

Q. Was there anything else in the basement that you remember besides stock in trade? [261]

A. Complete network of piping that we put in there shortly before the fire. There was a hot water tank; one small table. At the pump house there was a small electric light plant.

Q. Is that the one you were using?

A. No, that was a spare. That was a small one, just in case the other one went out; and there was a water pump, a bunch of garden hose.

(Testimony of Edward Herzinger.)

Q. Did you have an adding machine?

A. Yes, sir, I had an adding machine too. That was in the bar room.

Q. And did you have any spare parts for your Delco Diesel plant?

A. Yes. That was generally kept in the grocery store on the shelf there, small delicate parts for the Diesel.

Q. Did you have some spare pipe connections?

A. Yes, I did. It was down in the basement.

Q. Did you have any containers for fuel oil?

A. Had two for fuel oil stove.

Q. Two of those?

A. Yes, partly filled with fuel oil.

Q. Did you have any cleaning equipment?

A. Had brooms, push brooms and other brooms, and mops, mop fillers.

Q. Can you think of anything else, Mr. Herzinger?

A. Right off-hand I can't. There were a lot of small miscellaneous parts. [262]

Q. Let's go back over these then, Mr. Herzinger, and I wish you would give us your best estimate on the value of these different items as you gave them, to you as of the date of the fire. The first one is the candy case and the cigar case.

A. That was worth approximately $30.

Q. And the back bar with the mirrors?

A. That would be approximately $1,200 for that type of back bar.

Q. And the front bar?

(Testimony of Edward Herzinger.)

A. That would be about $300.

Q. And then you said you had a large cooler that held 25 cases of beer?

A. That would be about $200.

Q. You are not including any beer in there? That is for the cooler itself?

A. No, the cooler with the coils in it.

Q. And then you said you had a 3-compartment stainless steel sink back of the bar.

A. That would be about $105.

Q. And then you said a Coca-Cola cooler?

A. Oh, approximately $40.

Q. And then a 20-foot lunch counter?

A. Approximately $45.

Q. And butane gas stove in the lunch portion or back of the lunch counter?

A. About $265. [263]

Q. And then I believe you said you had a 3-compartment sink in back of the lunch counter?

A. About $110.

Q. And then you said you had a cash register in the lunch counter, or back of the lunch counter?

A. That one in the lunch counter would be approximately $100.

Q. And a cash register for the bar?

A. That would be about $200.

Q. Now did you have another cash register besides those two?

A. I had one in the grocery store.

Q. About what was that worth, if you remember?

A. Approximately $150.

(Testimony of Edward Herzinger.)

Q. And then I believe you said you had 15 large pictures, about 2 by 3 feet. What were they worth at that time?

A. They were worth about $5 apiece; would total up some $75.

Q. And you had some deer heads, I believe?

A. They were worth approximately $400 for the deer heads.

Q. And then you said, I believe, that you had nine bar stools that were padded?

A. They were $20 apiece, total approximately $180.

Q. And then four bar stools which were not padded, just wooden stools?

A. Possibly worth about $35.

Q. Panarama picture machine?

A. That would be $500. [264]

Q. And a piano? A. Approximately $250.

Q. And then a large leatherette bench?

A. Aprpoximately $20 on that bench.

Q. And 21 table? A. That was about $30.

Q. And a poker table?

A. Approximately $20.

Q. And a round dining table?

A. Approximately $15.

Q. Six chairs? A. About $35.

Q. Two burner fuel oil heating stove?

A. That was worth $200.

Q. And a crap table?

A. Approximately $450.

Q. Aluminal lighting fixture above the table?

(Testimony of Edward Herzinger.)

A. About $35.

Q. And I believe you said you had a Wurlitzer music machine? A. About $350.

Q. And four slot machines, 5, 10, 25 and 50?

A. Worth approximately $1500.

Q. And a bench under the machines?

A. Approximately $25.

Q. Then beginning this morning you said you had a set of cooking [265] utensils, dishes, and so forth?

A. About $125 to replace the equipment.

Q. And an electric mixer?

A. That is about $40.

Q. And then a stapler?

A. About $3.50.

Q. A panarama kit?

A. That was $75.

Q. And two toilet fixtures?

A. Approximately $75.

Q. And tapestry, wall tapestry and Christmas decorations in the bar.

A. Approximately $75.

Q. You said you had a safe?

A. About $50.

Q. And a lavatory? A. About $25.

Q. Towel cabinet?

A. About $20, I think, with the towels and cabinet complete.

Q. And then a burglar alarm system?

A. That run in the neighborhood of $85.

(Testimony of Edward Herzinger.)

Q. Then you said you had a set of fire extinguishers? A. About $225.

Q. Six panarama films? [266]

A. In the neighborhood of $35 to $50 apiece; approximately $200 for the six of them.

Q. And a two-wheel beer cart?

A. Approximately $16.50 on the beer cart.

Q. And then beer glasses and glasses of all kinds for the bar?

A. Approximately $125 worth of glassware.

Q. And then the grocery counter?

A. Oh, approximately $50.

Q. And the back grocery counter, shelves and drawers? A. Approximately $75.

Q. The grocery scales?

A. I would say about $65.

Q. Used kerosene refrigerator?

A. Well, I had a for sale sign on there for $100. I believe it was worth $100 at that time.

Q. Now this large icebox that was in the lean-to of the grocery store?

A. That would be about $25.

Q. And you stated you had two cream cans in there?

A. Well, the cream cans would be worth, oh say $5 apiece, $10, and I must have had about $13 worth of lighting bulbs.

Q. That is the flood light bulbs and the colored bulbs? A. Yes.

Q. I believe you said you had two barrel pumps in the oil house? [267]

(Testimony of Edward Herzinger.)

A. They run about $20 apiece, $40 for the two of them.

Q. And an air compressor?

A. Possibly $175.

Q. I believe you said you had a large vise in there? A. Approximately $40 for the vise.

Q. And two hydraulic jacks?

A. $15 apiece—$30 for the two.

Q. And then tools of all kinds?

A. I would say, oh approximately $85 worth of tools.

Q. A vulcanizing set?

A. In the neighborhood of $16.

Q. And two gas lanterns, I believe you said?

A. The two would be about $21.

Q. And then there were bed springs, mattresses and bedding in the cabin? A. Probably $115.

Q. Two alarm clocks?

A. About $2 apiece, $4 for the two.

Q. And then a fuel oil stove in the cabin?

A. Approximately $75.

Q. And two coal stoves?

A. They would be worth about $65.

Q. For the two of them? A. Yes, sir.

Q. Were they in use? [268]

A. They weren't in use, were stored.

Q. And a half-horse power compressor?

A. That would be about $300.

Q. And I believe you said there was a network of piping in the basement?

A. That would be approximately $150.

(Testimony of Edward Herzinger.)

Q. And you said you had a hot water tank down there? A. That would be about $135.

Q. And a small table in the basement?

A. Oh, approximately $5 for the small table.

Q. And a small electric light plant, the one which was not in use except for emergency?

A. Approximately $250.

Q. And water pump?

A. Approximately $100 for that water pump.

Q. And then some garden hose?

A. Approximately $10 for the garden hose.

Q. Your adding machine, what was that worth?

A. Approximately worth $65.

Q. And then your Diesel plant—those were Diesel parts, I believe.

A. Approximately, oh, $18 worth of Diesel parts there.

Q. And pipe connections?

A. Approximately $75 of pipe connections.

Q. I believe you said you had two oil barrels that were partly [269] filled with oil?

A. Around $15.

Q. For the two?

A. For the two of them with oil.

Q. Some mops and brooms?

A. Approximately $15.

Q. Could you estimate the total values which you have stated for these various items?

A. Oh, I estimated around $10,900.

Q. That is approximately the total of these figures which you have given us here?

(Testimony of Edward Herzinger.)

A. Yes, sir.

Q. Are those your best estimates of the values of the different items at the date of the fire?

A. Yes, sir, they are.

Q. There has been some talk, Mr. Herzinger, about the amount of money which was there in these buildings in the various containers at the time of the fire. Do you, of your own knowledge, know how much money there was there? Of your own knowledge do you know? A. No, I don't.

Q. Can you tell us how much you customarily left at the place for operating capital?

Mr. Halley: I object to that, your Honor. The witness has testified he has no knowledge as to what money was [270] there and what he customarily left there is no proof what was there the day of the fire.

The Court: Objection sustained.

Q. Do you remember, Mr. Herzinger when you were last at the premises before the fire?

A. Oh, it was approximately ten days before the fire. I went there the day before, I stopped there and unloaded some merchandise, but I didn't check on anything or do any of my business at that particular trip, because I was on my way to Elko.

Q. You didn't pick up any money and leave any certain amount?

A. No, I just stopped long enough to see what was going on there and unload my load and I went to Elko.

Q. Do you know how long it had been since you

(Testimony of Edward Herzinger.)

had picked up the money and left a certain amount there for operating capital?

A. Well, that was approximately ten days.

Q. And do you know the amount of money that you left there at that time?

A. I have a very close recollection of how much I had there.

Q. What is your best recollection?

Mr. Halley: I object to that your Honor. Ten days before the fire is no proof the day of the fire—this money is fluctuating and it is shown in the evidence it has fluctuated from time to time.

The Court: Objection sustained.

Q. You heard Mr. Moseley's testimony, didn't you, Mr. Herzinger. [271] concerning the amounts of money that were, in his estimation, in the different containers on the premises at the time of the fire? A. Yes, I did.

Q. Do you know of any other monies that were on the premises at the time of the fire?

A. Besides what he has mentioned?

Q. Yes. A. Yes, I do.

Q. What monies are those?

A. The money they put in——

Mr. Halley: May we inquire first before he answers that?

The Court: You may do so.

Q. (By Mr. Halley): I understand, Mr. Herzinger, the last time you knew of any money on the premises was ten days before the fire, is that correct?

(Testimony of Edward Herzinger.)

A. That is the last time I took money from there for banking purposes.

Q. In other words, you made no count of the money except ten days prior to the fire, is that right?

A. That's right.

Q. So what money was there at the date of the fire you would only know from what you have heard from some one else, isn't that true? [272]

A. That's right.

Mr. Halley: We object to the testimony, your Honor, being purely hearsay.

The Court: This witness is just testifying as to the amount of money which some one told him——

Mr. Daly: I don't believe that is quite correct. I believe if I can ask another question I can clear it up.

Mr. Halley: Is the present question withdrawn?

Mr. Daly: Yes, I will withdraw that question.

Q. (By Mr. Daly): I will ask you, Mr. Herzinger, if after the fire you recovered any mutiliated coins or mutilated silver? A. I did.

Q. And I will ask you what you did with it?

A. I put it all in a box and took it to the Fidelity Bank in Twin Falls.

Q. Where did you find it in the remains of the fire, if that is where you found it?

A. I found some in each of the three cash registers, and I found some in each of the four slot machines, and I found money in the three different fishing tackle boxes.

Q. Now were there mutilated silver or mutilated coins in all four slot machines? A. Yes.

(Testimony of Edward Herzinger.)

Q. I will ask you, Mr. Herzinger, how much money it took to load the slot machines; in other words, place them in operation? [273]

A. Well, them four slot machines of that denominations would take right close to the neighborhood of $300, I think, and the jack pots.

Q. Who had the keys to those slot machines?

A. I was the only one that carried the keys.

Q. I will ask you when was the last time you cleaned the excess money out of the machines?

A. About ten days prior to the fire.

Q. I will ask you if, from your knowledge of slot machines, there would be in excess of $300 in those machines at the time of the fire?

Mr. Vargas: We object to that—it calls for obvious pure assumption and conclusion of this witness.

The Court: Let me have the question.

(Question read.)

The Court: Objection will be sustained.

Q. Mr. Herzinger, how long have you been operating slot machines as an owner of machines?

A. Oh, possibly six or seven years prior to the fire.

Q. And have you opened the machines and taken the money out during that period? A. Yes.

Q. And you are familiar with the general operation of slot machines? A. I am. [274]

Q. How long had you been operating these particular four slot machines?

(Testimony of Edward Herzinger.)

A. Oh, possibly nine months.

Q. And were you familiar with their operation?

A. I was.

Q. Being familiar with the operation of these machines, can you predict with a reasonable degree of accuracy what money will be in a machine over a certain period? A. Yes, I could.

Q. Now I will ask you, Mr. Herzinger, based upon your experience in operating slot machines generally and in operating these machines, if you can say that there would be in excess of $300 in these four slot machines at the time of the fire?

Mr. Vargas: If the Court please, again we object to that on the same ground.

The Court: Objection sustained.

Q. I believe you said, Mr. Herzinger, that you picked mutilated silver out of the slot machines?

A. Yes, I did.

Q. How did you get it out?

A. I had to break the machines to get the mutilated silver out.

Q. And could you tell, when you were breaking up the machines, where the money was in the machines, where the money had been?

A. Each had its own compartment in the machine.

Q. Is there only one place in a slot machine where you found [275] mutiliated coins or mutilated silver?

A. No, there are three places.

Q. What are those?

(Testimony of Edward Herzinger.)

A. The back part and there is the tube and the cash box.

Q. And in how many places did you find mutilated silver or mutilated coins in the five-cent machine? A. In three of the places.

Q. And in the ten-cent machine?

A. In three of the places?

Q. And twenty-five cent machine?

A. In all three of the places.

Q. And the fifty-cent machine?

A. Also in all three of the places.

Q. I believe you said you put all the mutilated coins and mutilated silver in a box. What did you do with it then?

A. I took it to the Fidelity Bank in Twin Falls.

Q. And were you ever paid for that mutiliated coin and mutilated silver?

A. I got some returns for it.

Q. Do you know how much?

A. Oh, a little over $500.

Q. You received that? A. Yes.

Q. Did that mutilated coin and mutiliated silver which you took to the Fidelity Bank in Twin Falls include all of the mutilated [276] coin and silver from the slot machines, from the three cash registers and from the two cash boxes? Was it all that you found? A. Yes, that was all.

Q. Do you know whether or not all or a part of that was paid at a bullion rate?

A. Some was paid at a bullion rate.

Q. You don't know how much?

(Testimony of Edward Herzinger.)

A. Not exactly. I think I have a ticket showing what it was from the bank.

Q. Mr. Herzinger, do you have any complete list of your stock of merchandise at the time of the fire? A. You mean inventory sheets?

Q. An inventory of what you had at the time of the fire?

A. I wouldn't have an inventory exactly at the time of the fire.

Q. When did you take the last inventory prior to the fire? A. Well, on January 4th.

Q. Of what year? A. Of '47.

Q. Now did you receive invoices for merchandise purchased during the period from January 4th until the fire? A. Yes, I did.

Q. Do you have those?

A. No, I don't. [277]

Q. Do you know where they are?

A. They were burned up in the fire.

Q. Were any records kept showing the sales that were made during the period from January 4th to the time of the fire?

A. There were records kept.

Q. And do you have those? A. No, sir.

Q. Do you know where they are?

A. They went up with the flames with the rest of the stuff.

Q. Did you make any effort after the fire to determine what purchases you had made during that period between January 4th and the time of the fire?

A. Yes, I did.

(Testimony of Edward Herzinger.)

Q. What efforts did you make?

A. I went to the various wholesale houses that I have been buying from and they gave me a copy of the invoices that I lost in the fire.

Q. Is that the only information you have?

A. That is about the only information I have.

Q. Do you know from your observation and from the inquiries that you made, from your knowledge of what purchases were made, whether your inventory was larger or smaller at the time of the fire than it was on January 4, 1947?

A. I would say it was larger.

Q. Do you have any idea how much? [278]

A. Approximately a thousand dollars, somewhere in there.

Q. Mr. Herzinger, how was that inventory on January 4, 1947, taken? Who took it?

A. I called out the items myself from the shelves and various places.

Q. And was that written down?

A. Yes, sir.

Q. Who wrote it down?

A. My sister-in-law.

Q. Are you familiar with her handwriting?

A. I am.

Q. Handing you Plaintiff's Exhibit marked 11 for identification, I will ask you if that is the inventory of January 4, 1947?

A. Yes, sir, that is the inventory I took January 4th.

Q. And this sheet that is glued to the front, is

(Testimony of Edward Herzinger.)

that an adding machine tape that represents the total of the inventory on that date?

A. Yes, it does.

Mr. Daly: I will offer Plaintiff's Exhibit No. 11 in evidence.

Mr. Vargas: May I inquire?

Mr. Daly: Surely.

Q. (By Mr. Vargas): In whose possession has this document, Exhibit 11 for identification, been retained? [279] A. In mine.

Q. And where have you kept it?

A. I have kept it in the safe at home.

Q. By home do you refer to the Mineral Hot Springs?

A. In my home. I am referring to my land and stock ranch at Buhl, Idaho.

Q. Did you take it there shortly after it was made?

A. Right soon after it was made, I did. As soon as I got home with it.

Q. Do you have any other records of this business of the Mineral Hot Springs that are retained at your ranch? A. I have.

Q. But you had none of the actual books of this business? They were destroyed in the fire, I understand?

A. Well, for the period of that year before the fire they was destroyed. I had previous records.

Q. Was your general office in connection with your business enterprise maintained at the ranch, Mr. Herzinger? A. Part of it was.

(Testimony of Edward Herzinger.)

Q. Did you make payment in connection with purchases for the Hot Springs business from the ranch? In other words, do you have at your ranch any check-book records relating to business of the Mineral Hot Springs from the first of January, 1947, to the time of the fire?

A. You mean during the year of '47? [280]

Q. Yes, from January up to May?

A. I have some cancelled checks there, if that is what you mean.

Q. What generally would those be, Mr. Herzinger, cancelled checks you have in the ranch? Would they relate to purchases for groceries in your store business, or what?

A. Well, there would be some for groceries and other expenses, wages.

Q. Now the figures that are contained on this Exhibit 11 for identification, what would be your best recollection as to whether they are wholesale or retail figures?

A. The retail figures are in a different column. They are segregated.

Q. There seems to be only one column of figures on page one.

A. They would represent the wholesale price on that page there.

Q. Now there are some partial figures in the two columns on the first side of sheet one.

A. These would be the retail ones and them is the wholesale.

Q. Referring to the column of figures closest to

(Testimony of Edward Herzinger.)

the center of the sheet, you say those are retail figures? A. Yes, sir.

Q. The column of figures near the outside of the sheet represent wholesale? A. Yes.

Q. Is that true throughout the exhibit, that same situation? [281] A. I think it is.

Q. Will you take a look and tell me whether or not that is the case?

A. It would take rather a long time to go over each article separately, but I would say that this column closest to the right is the retail price and the next column is the wholesale price.

Q. Referring to the next column, I mean the column toward the right outside of the pages as the document is held and you are looking at it?

A. Yes.

Mr. Vargas: For what it is worth, if the Court please, I do not think we have any objections.

Mr. Platt: I have no objection.

The Court: It may be admitted in evidence, Exhibit 11.

Q. (By Mr. Daly): Mr. Herzinger, with reference to wholesale and retail prices, I will ask you to examine Plaintiff's Exhibit No. 11 and have you tell us if, where prices are shown retail, any discount is made in the figure which is used to obtain the total amounts you have incorporated?

A. Yes, there is.

Q. And did you have a uniform mark-up on your grocery items? A. Yes, we did.

Q. What was that mark-up?

(Testimony of Edward Herzinger.)

A. Twenty-five per cent. [282]

Q. Did you discount the 25 per cent from the retail prices shown there in determining your totals as of January 4, 1947? A. I did.

Q. Will you tell us what your total inventory on January 4, 1947 was? You may go to my exhibit.

A. $15,767.69.

Q. From this inventory, Mr. Herzinger, and from your observations and knowledge of purchases, what then would be your best estimate of the inventory on hand at the time of the fire?

Mr. Halley: We believe, your Honor, that has already been asked and answered. He said his best estimate was it was a thousand dollars more than it was on January 4th.

The Court: I believe so.

Q. Now, Mr. Herz, in addition to these buildings shown on here and their contents, was anything else destroyed by the fire? A. Yes, there was.

Q. What else?

A. There was a trailer house sitting right behind the building that is shown down there marked "T."

Q. Was that your trailer house? A. Yes.

Q. What kind of trailer house was it, do you know? A. That would be hard to describe.

Q. Did it have a trade name? [283]

A. No, it had no trade name.

Q. Do you know its approximate value at the time of the fire? A. Yes, I do.

(Testimony of Edward Herzinger.)

Q. And what is your best estimate of its value at the time of the fire?

A. One thousand dollars.

Q. I ask you, Mr. Herzinger, who owned the tanks and the pumps which were at the station at the time of the fire?

A. The Standard Oil Company of California.

Q. Did you pay rent on those? A. Yes.

Q. In connection with the buildings, Mr. Herzinger, did you have any fire insurance coverage the date of the fire? A. I had some.

Q. Did you make any recovery from your fire insurance carried? A. Yes, I did.

Q. As a condition to that recovery, Mr. Herzinger, were you required to agree and assign the amount recovered from them from anything you might recover in this action? A. Yes, sir.

Q. And what was the amount that you recovered?

A. Four thousand dollars.

Q. How much? A. Four thousand dollars.

Q. Was that all the insurance you had on the buildings involved? [284]

A. Yes, it was.

Q. Did you have any more coverage on the buildings which were not destroyed? A. Yes.

Q. How much total coverage was there on the premises at that time? A. Five thousand.

Q. And your recovery was four thousand?

A. Yes.

Q. Now, Mr. Herzinger, I will give you Plaintiff's Exhibits No. 1 and No. 2 and No. 3 and No. 4

(Testimony of Edward Herzinger.)

and ask you to examine them and tell us whether or not they represent the typical or the formal way in which your business with Standard Oil was handled at about the time and prior to the fire?

Mr. Platt: That is quite a comprehensive question.

Mr. Daly: It perhaps is too much so.

Mr. Platt: Yes, I don't understand it quite.

Mr. Daly: I will withdraw it and ask several simpler ones that will perhaps be better.

Q. I hand you Plaintiff's Exhibit No. 1, Mr. Herzinger, and ask you what is it?

A. That is an invoice on gasoline that the truck driver makes when he delivers gasoline.

Q. Was that a typical invoice for the petroleum products delivered [285] by Mr. Odermatt or one of his helpers to your station at that time?

A. It was.

Q. Mr. Herzinger, what is Plaintiff's Exhibit No. 2?

A. That is acknowledgment of delivery receipt given for the credit cards for gasoline. When the truck comes up with gasoline, makes deliveries, we turn the credit cards to him and he credits them on this slip and takes them from the total and takes them at face value the same as money.

Q. Is that typical of the way you handled credits for merchandise that you delivered on credit cards at that time? A. Yes.

Q. What is Plaintiff's Exhibit 3, Mr. Herzinger?

A. That is a check made out to the Standard Oil

(Testimony of Edward Herzinger.)

Company for the amount of $180.82, payable for gasoline delivered at my place.

Q. And is that the typical and formal way in which you made payments to the Standard Oil Company? A. It was at that time.

Q. What is Plaintiff's Exhibit No. 4, Mr. Herzinger?

A. Well, it is either invoice or slip for rent on the pumps and tanks that are paid to the Standard Oil Company.

Mr. Platt: May I see that?

Mr. Daly: Yes.

Q. Was that the formal and typical way by which you paid or [286] receipted for rent paid the Standard Oil at that time? A. Yes.

Q. Then is it correct to say, Mr. Herzinger, that these four exhibits represent generally the typical method by which you were doing business with the Standard Oil Company of California at and prior to the fire? A. Yes.

Q. Now after this fire, Mr. Herzinger, did you continue in business? A. After the fire?

Q. Yes. A. Not for a few days.

Q. Well, what did you do right after the fire with reference to continuing in business?

A. I went to a cabin right back of the place there and installed a small bar in there and a few pieces of equipment on the place there, just about 10 by 12, and started to operate in that cabin.

Q. Can you show us, Mr. Herzinger, on here about where that cabin would be?

(Testimony of Edward Herzinger.)

A. It would be down below—judging by the scale here, I would say it would be just about in this position here.

Q. And do you know about how far that is from the highway?

Mr. Vargas: For the purpose of the record, will you identify the phrase "in this position." He is pointing to an [287] area at the back of the blackboard.

Q. Is the cabin which you are speaking of, Mr. Herzinger, located directly east from the northeast corner of the bar room? A. Yes.

Q. And how far about?

A. I would say about 100 feet.

Q. East? A. Yes.

Q. How far would that be from the highway, do you know, Mr. Herzinger?

A. I guess it would make that about 225 feet from the oil.

Q. From the oil? A. Yes.

Q. How soon after the fire did you get set up in this cabin?

A. I would say about six or seven days.

Q. What business were you able to do there?

A. Very little.

Q. What did it consist of?

A. You mean the merchandise?

Q. Yes, what did you have to sell generally?

A. We had a little beer and soft drinks and liquor.

Q. Any groceries?

(Testimony of Edward Herzinger.)

A. Very little groceries. We had some bread and supplies brought down. There might have been a few articles of groceries [288] but very few.

Q. Did you have any slot machines?

A. As near as I can recollect, I had two other slot machines that I took down there.

Q. Did you have any bar facilities?

A. I had a small bar there.

Q. What about gambling facilities?

A. There was none.

Q. How long did you remain in this cabin as far as the business was concerned, if you remember?

A. My best recollection it might have been sixty days.

Q. And did you do anything in the meantime to get better or larger facilities for your business?

A. I put a small building, built rather a small building, over the pump where the pump house burned down, which was a little larger than the present place, and moved into that.

Q. A little larger than the present place, what do you mean? A. That little cabin.

Q. A little larger than the cabin? A. Yes.

Q. Was it nearer the highway?

A. I would say it was a hundred feet closer to the highway.

Q. And did you move into that within about sixty days? A. To my best recollection.

Q. What, if any, efforts did you put forth to get a permanent [289] building where the buildings had been destroyed?

(Testimony of Edward Herzinger.)

A. Well, I had a caterpillar come in there and dig out a larger basement than there was before. Prior to that we had to clean out all the burned rubbish and cache everything, the remains.

Q. Who did that work, Mr. Herzinger, if you remember?

A. A person by the name of Nelson.

Q. You hired him to do that? A. Yes.

Q. Do you remember what you paid him to do that?

A. My best recollection I think it was $150.

Q. Was it your intention at that time, immediately after the fire, within sixty days after, to rebuild and continue your business at that point?

A. That was my intentions.

Q. You did intend——

A. To build a new place and move into a larger place.

Q. Did you do that?

A. Finally I did. In the meantime, I still had another place.

Q. Tell us about that, when you got in it.

A. Well, the school board in Contact, Nevada, were selling an old school house under sealed bids, so I put my bid in there too and I happened to get the school house, so then I hired a mover to move it down right next to that pump house building where we were. [290]

Q. Where is that with reference to this chart, where would it have been located?

A. That would have been located very close to

(Testimony of Edward Herzinger.)

the northwest corner of where you see that pump house.

Q. How big a building was this old school house?

A. Oh, approximately 20 by 24 and it had a lean-to behind it.

Q. Which gave it a little more room?

A. Yes, storage room.

Q. Would you know about when you moved into that old school house?

A. I would say sometime in July, to the best of my recollection.

Q. Of 1947?

A. Yes, possibly the latter part.

Q. What type of construction was it?

A. It was a frame building.

Q. You said you eventually did rebuild. What sort of building did you put on the premises?

Mr. Vargas: If the Court please, I do not see the materiality of that.

The Court: I don't either. What is the purpose of that, Mr. Daly?

Mr. Daly: I was only introducing this line of testimony to show the mitigation of damages to the full extent of Mr. Herzinger's ability and, of course, in connection with the [291] claimed loss of profits, the facilities which he had available in the interim before he got a place to rebuild.

The Court: Objection will be sustained.

Q. Did you commence building your new building, Mr. Herzinger, as soon as you could?

A. Yes.

(Testimony of Edward Herzinger.)

Q. And did you move into the building as soon as it was possible for you to do so?

A. Yes, I did.

Q. When did you get into your new building?

A. Oh, opened up on the 26th day of December, 1947.

Q. Mr. Herzinger, what was one of the chief sources of your income during the period shortly before the fire? Where did a good percentage of your business come from?

A. You mean the customers?

Q. Yes.

A. Oh, from the U. C. Land and Cattle Company, situated all through the valley there. San Juacinto was one of the big headquarters, H. D. headquarter ranch.

Q. When, if you know, did the U. C. Land and Cattle Company complete its operations in San Juacinto and vicinity?

A. I couldn't say for sure, but it seems to me like about the end of the year 1947, my best recollection.

Q. Was a substantial part of your business tourist trade?

A. There was a little through the summer months. [292]

Q. What months particularly, if you can remember?

A. It started in May—June, July, August, September, all through there.

Q. During the time immediately following the

(Testimony of Edward Herzinger.)

fire, Mr. Herzinger, and up until December 26, 1947, did you suffer any loss of profits by reason of the fire? A. I did.

Q. Can you tell us your best estimate, Mr. Herzinger, of what profits you lost during that period?

Mr. Vargas: It obviously calls for guess, speculation, conclusion of the witness, certainly calls for self-serving declaration on behalf of the plaintiff himself. Objected to on each of those grounds.

Mr. Daly: If the Court please, he is the owner and operator of the business and I believe he can testify as to what his loss of profits were during this period.

The Court: Any question as to loss of profits being proper.

Mr. Vargas: That is correct, but at the same time it is involving so many elements of speculation.

Mr. Daly: Those are matters for cross-examination.

Mr. Vargas: I submit it is a self-serving declaration, not predicated upon records, simply estimate and opinion of this witness—self-serving.

The Court: You might be short on the foundation there. [293]

Mr. Daly: Perhaps I can ask a few more questions.

Q. How long, Mr. Herzinger, had you operated this business prior to the fire? When did you begin operating the business?

A. The latter part of February, '46.

(Testimony of Edward Herzinger.)

Q. And did you operate it then continuously until the time of the fire? A. Yes.

Q. Do you know the approximate amount of the profits which you made during that period?

The Court: What period is that?

Mr. Daly: It is the period from the date of purchase, which was the latter part of February of 1946, until the time of the fire, which is the 3rd of May, 1947.

Mr. Vargas: If the Court please, with reference to that question, taking any profits of this business from February, '46, the witness has already testified that he had available records of this business which were created on January 4, 1947, namely, the inventory. Now there isn't anything which demonstrated, up to this point, that any records of this business for the year 1946 are not wholly available and open for inspection. We object to this line of testimony upon the ground no proper foundation has been laid for this. If there are such books and records, they are certainly the best evidence.

Mr. Daly: I will ask Mr. Herzinger about records. [294]

The Court: Very well.

Q. Do you have, Mr. Herzinger, available records which show your profits made for operating the Mineral Hot Springs from the time you purchased it, the latter part of February, until the date of this fire, the 3rd day of May, 1947?

A. I don't have them.

Q. Were there ever any records by which your profits could be determined?

(Testimony of Edward Herzinger.)

A. There were. We always kept records in all these places.

Q. What has happened to those records? Where are they, if you don't have them?

A. They were burned up in that fire.

Q. Now, Mr. Herzinger, can you estimate for us the profit which you made in operating the Mineral Hot Springs from the period between February 25, 1946, and the date of the fire, May 3, 1947? Yes or no answer—can you tell us? A. Yes.

Q. What is your estimate?

Mr. Vargas: If the Court please, prior to answer to that question I would like permission of the Court to interrogate further with reference to possible objection.

The Court: You may do so.

Q. (By Mr. Vargas): Is it your testimony, Mr. Herzinger, that everyone of the records of the Mineral Hot Springs business, save and except alone the inventory prepared on January 4, 1947, [295] was destroyed in the fire?

A. Well, practically all of it was, outside a few cancelled checks that I told you I had.

Q. In other words, the only thing apparently that you took from the business over to your ranch reflecting the condition of the business for the year 1946 was this inventory. A. My place, yes.

Q. Did you make out an income tax return for the business in 1946? A. Yes, sir.

Q. When was that made out?

A. It was finished some time between January 1st and January 15, 1947.

(Testimony of Edward Herzinger.)

Q. So you would say that your income tax return involving this business at Mineral Hot Springs had been prepared and completed by January 15, 1947, for the year 1946? A. Yes.

Q. Your copy of that document you didn't then take over to your office at your ranch?

A. Of this income tax?

Q. Yes.

A. That is where I keep all my income tax records, at the ranch.

Q. Then you have available at the ranch the income tax record of this business for the year 1946, have you not? [296]

A. I have at the present time.

Q. That record, I take it, reflects the profits of this business, if any profits there were, during the year 1946? A. It should.

Mr. Vargas: If the Court please, I submit that there is a record prepared in the ordinary course of business, federal income tax return obtainable and demonstrating the testimony sought now to be elicited from recollection and estimate of this witness, and I object to it on the ground there is better evidence, namely, the plaintiff's income tax record for the year 1946, which is now available and under the control of the plaintiff.

Mr. Daly: I take it if we were here trying to get an income tax record introduced, counsel's objection would be offered it was not a primary entry, which was not the best evidence under those circumstances. Of course, it is a confidential document.

(Testimony of Edward Herzinger.)

Mr. Vargas: It is not in here now, when he is in here stating these things. We certainly have a right to examine what he had in his income tax return.

The Court: It would seem to me if he has a record of the profits which he claims between the two dates, no matter what form they might be in, they ought to be accounted for before he could testify as he is asked here to testify from his recollection. [297]

Q. (By Mr. Daly): Mr. Herzinger, this income tax return that Mr. Vargas has been talking to you about, what period does it cover?

A. In regard to Mineral Hot Springs?

Q. Well, was it a separate return relating only to Mineral Hot Springs?

A. No, it was combined with all my other income that I had off the ranch or various income I had had during that year.

Q. During the calendar year of 1946?

A. Yes.

Q. You don't have that with you?

A. No, sir, I don't.

Q. Did it show income separately from Mineral Hot Springs?

A. It might now, I couldn't say whether it did or not. I had them papers prepared by another party.

Q. You don't know whether it would show and whether you could determine from it the income from Mineral Hot Springs, is that right?

(Testimony of Edward Herzinger.)

A. No, I wouldn't know.

Q. Mr. Herzinger, do you know what the income from the Mineral Hot Springs was from January 1 of 1947 until the time of the fire?

Mr. Halley: That is just a yes or no answer.

Mr. Daly: Yes.

A. No, not accurately.

Q. Do you have any records from which that could be determined [298] exactly?

A. Yes, I have, to my best recollection.

Q. What are those records?

A. They are copies of the invoices from various wholesale houses that I have done business with, beside the inventory of January 1, 1947.

Q. They would show the amount of some of the purchases you have made? A. Yes.

Q. Mr. Herzinger, handing you what is marked Plaintiff's Exhibit No. 12 for identification, I will ask you what it is?

A. That is a copy of invoice from Peraldo Wholesale Company, Elko, Nevada, for the period January 1, 1947 to April 30, 1947, purchase receipt.

Q. Was this given to you at your request?

A. Yes.

Q. Handing you Plaintiff's Exhibit No. 13 for identification, I will ask you what it is?

A. That is another copy of invoice from John Digrazia.

Q. Covering the same period?

A. Covering the same period as that.

Q. Was it given to you at your request?

(Testimony of Edward Herzinger.)

A. Yes, it was.

Q. Handing you what has been marked Plaintiff's Exhibit 14 for identification, I will ask you what it is? [299]

A. That is a copy of an invoice of Davidson Wholesale Company covering the same period, from January 1 to May 3, 1947.

Q. Was it given to you at your request?

A. Yes, it was.

Q. And handing you what has been marked Plaintiff's Exhibit 15 for identification, I will ask you what it is?

A. This first exhibit you handed me——

Q. Exhibit 12?

A. Was covering a period up to April 5, 1947.

Q. From whom?

A. From the Peraldo Distributing Company. This sheet here covered the same period, from January 1, 1947, to May 3rd.

Q. In other words, the exhibits 12 and 15 are in part duplicate?

A. Yes, they didn't finish and the next time I went to Elko I had them check on their books and see these later purchases and furnish me this copy.

Q. Does Plaintiff's Exhibit 15 for identification then purport to show the purchases by you from the Peraldo Distributing Company from January 1, 1947, to May 3, 1947? A. Yes.

Q. I hand you Plaintiff's Exhibit marked 16 for identification and ask you what it is?

The Court: We will take our recess at this time.

(Recess taken at 11.50.) [300]

No. 12668

United States
Court of Appeals
for the Ninth Circuit.

EDWARD HERZINGER,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT,

Appellees.

Transcript of Record
In Two Volumes
Volume II
(Pages 315 to 542)

Appeal from the United States District Court, for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12668

United States
Court of Appeals
for the Ninth Circuit.

EDWARD HERZINGER,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT,

Appellees.

Transcript of Record
In Two Volumes
Volume II
(Pages 315 to 542)

Appeal from the United States District Court, for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

February 10, 1950, 1:30 P.M.

Presence of the jury stipulated.

MR. HERZINGER

resumes the witness stand on further

Direct Examination

By Mr. Daly:

Q. I believe, Mr. Herzinger, I had just handed you what has been marked Plaintiff's Exhibit 16 for identification and asked you what it is.

A. That is a copy of invoice from the Davidson Wholesale, January 1, 1947 and May 3, 1947.

Q. And what is Plaintiff's Exhibit marked No. 17?

A. That is copy of an invoice from the Reeves Wholesale Company during the same period, January 1, 1947, to May 3, 1947.

Q. Mr. Herzinger, do you have any other records available which will show to any extent the business which you did during the period from January 1, 1947, until the date of the fire? A. No.

Mr. Daly: We will offer these plaintiff's Exhibits, 12 through 17.

Mr. Halley: On behalf of the defendant Odermatt, we have no objection to the introduction of the exhibits.

Mr. Platt: We have no objection either.

The Court: Exhibits 12, 13, 14, 15, 16 and 17 admitted in evidence.

Q. Mr. Herzinger, did you buy other items of merchandise in [301] the period January 1, 1947,

(Testimony of Edward Herzinger.)

until the date of the fire, other than shown on these exhibits, being Plaintiff's Exhibits 12 throught 17?

A. No.

Q. Mr. Herzinger, did you make a profit in the operation of Mineral Hot Springs during the month of January, 1947? A. Yes.

Q. And did you make a profit in the operation of Mineral Hot Springs in February of 1947?

A. Yes.

Q. Did you make a profit in the operation of Mineral Hot Springs in the month of March, 1947?

A. Yes.

Q. Did you make a profit in the operation of Mineral Hot Springs in April of 1947?

A. Yes.

Q. Mr. Herzinger, based upon your general knowledge, being from operating this business and other like businesses, and what you know of this business and the profits made in the first four months, did you suffer a loss of profits from the fire there?

Mr. Halley: That is to be answered yes or no, your Honor.

A. Yes.

Q. And from the period of the fire until the time you moved [302] into the new buildings, how much loss of profit did you suffer?

Mr. Halley: To that we object, your Honor, first on the ground the proper foundation has not been laid; second, calls for conclusion of this witness.

(Testimony of Edward Herzinger.)

The Court: It seems to me that would be a matter for the jury to determine from the facts.

Mr. Wilson: It goes to the weight rather than the admissibility.

The Court: The jury, it seems to me, would be required to determine the amount of damages here and this is one of the items damage is based on. You can show any facts from which the jury might infer what the answer to the question is. I will sustain the objection.

Mr. Daly: In view of the Court's ruling, I will not attempt to proceed further along this line.

Q. Mr. Herzinger, when you visited the Mineral Hot Springs after the fire, did you observe the hose, or remains of a hose, near the pumps?

A. Yes.

Q. Can you tell us what you saw?

A. I saw what seemed to be the remains of a hose used for bringing gasoline from the gas truck into the storage tanks on the ground.

Q. Where was it located? [303]

A. Right alongside the gas pumps.

Q. Could you show us on this sketch over here where it was? A. Yes.

Q. Would you do that?

A. From the filler pipe between the gas pumps in a rather southerly, partly westerly, direction.

Q. Where was the nozzle of the hose, if you noticed?

A. It was still stuck down in the filler pipe.

Q. Mr. Herzinger, did you take any pictures of

(Testimony of Edward Herzinger.)

the premises there after the fire? A. Yes.

Q. When did you take them, if you remember?

A. The next day after the fire.

Q. Do you know what time of day?

A. Oh, approximately ten or eleven o'clock in the forenoon.

Q. I ask you, Mr. Herzinger to take and examine Plaintiff's Exhibits marked 18 through 25 for identification and tell us if those are pictures you took?

A. Those are the pictures I took on that date.

Q. Do those pictures accurately show what is in each one as to the condition of the premises there at Mineral Hot Springs? A. Yes, they do.

Mr. Daly: I offer Plaintiff's Exhibits 18 through 25 in evidence.

Mr. Platt: Your Honor, it is somewhat difficult to [304] know what each of these pictures represents, but in order to get a little further enlightenment upon them, I would like to have the privilege of asking the witness a question or two with respect to one of these photographs.

The Court: You may do so.

Mr. Platt: That is Plaintiff's Exhibit 19 for identification.

Q. (By Mr. Platt): I hand you, Mr. Herzinger, Plaintiff's Exhibit 19 for identification. I notice what appears to be a hose in that picture. Is that true? Is a hose indicated on that picture?

A. Not the hose. It is the wire coil from the remains of the hose.

Q. That is, when you talked about the hose in

(Testimony of Edward Herzinger.)

your direct examination, what you meant was the wire coil remaining that was in the hose before the fire? A. You mean when I said——

Q. Maybe I can clarify that a little more. That picture in part represents, doesn't it, the remains of the hose that you saw the next day after the fire?

A. Yes.

Q. Now just where was the hose located relative to the pumps? Were there any pumps remaining when you were there?

A. There were the burned carcass, you might say. The pumps were here, but they were burned.

Q. The remains of that hose which you saw, were they in the basement or were they on the surface in front of where the pumps should have been or were?

Mr. Parry: We object to that as not proper inquiry as to this exhibit. The testimony as to the hose being near the pump was the day of the fire. This picture was taken the next day.

Mr. Platt: I understand that. I think counsel misunderstands me. I acknowledge this photograph was taken the day after the fire, wasn't it?

A. Yes.

Q. That is what I am referring to and I am referring to the remainder of the hose in this photograph.

Mr. Parry: But your question was asked about being near the pumps the day of the fire.

Mr. Platt: What I hope to show, and make clear to the witness was whether the remains of this hose were lying near the remains of the pumps.

(Testimony of Edward Herzinger.)

Mr. Parry: What was the date?

Mr. Platt: On the 4th day of May, the day after the fire. In other words, your Honor, I am trying to locate the remains of that hose.

A. When I made the photograph, it wasn't laying near the pumps.

Q. Where was the remains of the hose actually lying as evidenced in that picture? [306]

A. In the basement, underneath what used to be the bar room.

Q. Then in order that there won't be any doubt at all in your mind and my mind, this photograph of the remains of the hose was taken in the basement?

A. Yes.

The Court: What is the number of that exhibit, Mr. Platt?

Mr. Platt: That is Plaintiff's Exhibit 19 for identification.

The Court: Any objection to the introduction of the photographs?

Mr. Halley: We have none.

Mr. Platt: I have none, your Honor.

The Court: The exhibits may be admitted in evidence. Nos. 18 to 25 inclusive.

Q. Handing you Plaintiff's Exhibit 18, Mr. Herzinger, can you tell us what that is a picture of?

A. That is a picture of part of the ruins of the Mineral Hot Springs taken after the fire.

Q. What ruins, if you know?

A. That is the wall made of sandstone or lime-

(Testimony of Edward Herzinger.)

stone that used to be the east wall of the grocery store.

Q. And the lean-to would have been toward you as you took the picture, is that right?

A. Yes. [307]

Q. Tell us the same thing about Plaintiff's Exhibit No. 19.

A. That is another picture of part of the ruins at Mineral Hot Springs. It shows the south wall of the same grocery store, what used to be. This portion used to be the bar room. And also shows the remains what used to be delivery gasoline hose.

Q. Go ahead again and tell us again on that, tell us where you were standing when you took that picture.

A. I was standing where used to be in front of the bar room. The front of the basement. I was facing in an easterly direction.

Q. Will you tell us the same thing about Plaintiff's Exhibit No. 20.

A. This is another picture of some of the ruins at Mineral Hot Springs and it shows the burned gasoline pump and part of the foundation the pump set on.

Q. Where were you standing when you took that picture?

A. I was standing in front of the cabin taking the picture in a southerly direction.

Q. Tell us the same thing about Plaintiff's Exhibit No. 21. What it is and where you were.

A. That is the same, some of the ruins down at

(Testimony of Edward Herzinger.)

Mineral Hot Springs and it shows the ruins in the basement. This was taken from east towards the west; in other words, toward the highway.

Q. Will you tell us what was in Plaintiff's Exhibit No. 22?

A. This is a similar picture, showing the remains in the basement, [308] just a slightly different angle, slightly to the northwest; still towards the highway.

Q. Will you tell us what is in Plaintiff's Exhibit 23 and where you were when you took the picture?

A. I was standing between the basement and the highway, the basement in a northeast direction. That is a picture of the south wall of what used to be the grocery store and it shows the double cabin behind the remains, which did not burn down, and shows part of the basement where the remains are.

Q. I notice a little dark place above a window, which would be the south window of what you call the cabin in the rear. What was that?

A. That was part of the window being charred from the fire.

Q. That was the only damage done?

A. The only damage done, just a little charred.

Q. Will you tell us what is shown in Plaintiff's Exhibit 24 and where you were standing when you took the picture?

A. Another picture shows gasoline pumps, part of one and also of another one, one of the posts held up the canopy, a little portion of the concrete on which the pump is located, also the filled pump to

(Testimony of Edward Herzinger.)

the underground tank. It was taken in a northeast direction.

Q. What is that article that looks a little like a mushroom in the center?

A. That was a stand where they used to put the hose when they [309] servicing a car, just sort of a bench outside.

Q. Tell us what is shown in Plaintiff's Exhibit 25 and where you took the picture.

A. It is another picture of one of the gas pumps and it is taken toward the highway in a westerly direction. It shows one of the gas pumps and part of the concrete island on which it is located.

Q. Mr. Herzinger, there has been considerable talk about burned checks. Are you, in your complaint, asking anything for the burned checks?

A. No.

Mr. Daly: You may cross-examine.

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Herzinger, you purchased the Mineral Hot Springs in February of 1946, is that correct?

A. Yes.

Q. And from whom did you purchase it?

A. Rube Brown.

Q. And at the time you took possession of these premises, I will ask you to state if Mr. Moseley was already there? A. Yes, he was.

Q. And he then continued in your employment, is that correct? A. I didn't get you.

(Testimony of Edward Herzinger.)

Q. In other words, he just kept working there for you? [310] A. Yes.

Q. And as a matter of fact he is working for you at the present time? A. Yes.

Q. Generally, what is the capacity of Mr. Moseley; that is, what is his job?

A. Well, he is the manager there.

Q. And during your absence does he take the sole charge of the operation and the management of the Hot Springs and the store and the cabins and everything? A. He does.

Q. Now you stated on direct examination, you identify this diagram as constituting the premises which were in existence just prior to the fire on May 3, 1947, is that correct? A. Yes.

Q. Now, Mr. Herzinger, were all of these buildings destroyed? A. Yes.

Q. That is the bar, grocery, 12 by 12 cabin, 14 by 14 oil house. Was the pump house destroyed?

A. Yes.

Q. Mr. Herzinger, how far is it from the cabin to the pump house?

A. Oh, I would say approximately 80 feet.

Q. Eighty feet? A. Approximately. [311]

Q. How much distance was there from the oil house to the pump house?

A. Approximately forty feet, I would say.

Q. So that the pump house, then, Mr. Herzinger, was 40 feet away from the oil house and 80 feet away from the cabin?

A. That is my best knowledge.

(Testimony of Edward Herzinger.)

Q. Now I believe that you testified that the first notice that you had of this fire was about two o'clock on the afternoon of May 3rd, at which time you were in Wells, is that correct? A. Yes.

Q. Now how long after was it, after you discovered, or rather were notified as to the fire, how long after that was it that you arrived at Mineral Hot Springs? A. Approximately two hours.

Q. That would have made it about four, is that correct?

A. You mean four o'clock in the afternoon?

Q. Yes.

A. That is about the time, to the best of my recollection.

Q. How far is it from Wells to the Mineral Hot Springs? A. About 52 miles.

Q. What kind of road is that?

A. I couldn't just say at that time. It is an oiled road but there has been lots of construction work and they had gravel on part of it. [312]

Q. It is, however, a State highway, isn't it, Highway 93? A. Yes.

Q. You, upon arriving at Mineral Hot Springs, parked your automobile and talked to several people? A. Yes.

Q. Just whom did you talk to?

A. Talked to Mr. Odermatt, talked to Ross Moseley, talked to Mr. McLean, and there were a number of people from the San Juacinto, which I didn't know their names. They were strangers to me.

Q. But it is a fact, is it not, Mr. Herzinger, that

(Testimony of Edward Herzinger.)

after you discovered, or were notified, of the fire and you travelled to the Mineral Hot Springs, that Mr. Odermatt was there already?

A. I couldn't say as to that. He may have been.

Q. Did you see Lee Nielson?

A. I can't just recall whether I seen him there.

Q. Now please describe, if you will, Mr. Herzinger, just what the people who were at the scene of the fire were doing when you arrived there about four o'clock.

A. As near as I can remember they were just kind of grouped together and talking about the fire. All I could see they could do.

Q. Was the fire still burning?

A. Not in a blaze.

Q. Smoldering? A. Yes. [313]

Q. Did you see Jim Zilliox?

A. I couldn't recall if I did or not.

Q. What was Mr. Moseley doing?

A. Just talking to some of them people there, the same as anybody else.

Q. At the time you arrived there at four o'clock, or shortly thereafter, I will ask you to state if Mr. Moseley had opened up a temporary bar?

A. I hadn't seen him.

Q. Isn't it a fact, Mr. Herzinger, shortly after the fire that day Mr. Moseley opened up a temporary bar and sold liquor and drinks in this temporary bar in one of the buildings which was immediately behind the burned premises?

A. Not when I was on the premises.

(Testimony of Edward Herzinger.)

Q. How long did you remain on the premises after arriving there at four o'clock?

A. I stayed there until it was dark. I couldn't say just what time of the evening it was.

Q. It was dark however? A. Yes, it was.

Q. And during the month of May, in the area of Contact, Nevada and the Mineral Hot Springs, when did it start to get dark?

A. I would say about eight o'clock, possibly 8:30.

Q. So that you were there from four o'clock in the afternoon until at least 8:30 that evening? [314]

A. About that time.

Q. Or approximately four and a half hours?

A. Yes.

Q. And your testimony is to the effect that during the 4½ hours that you were there you did not see or know of the existence of a temporary bar which had been put up to the rear of the burned buildings and put in operation? A. No.

Q. You say you saw Mr. Odermatt that day?

A. Yes.

Q. On more than one occasion?

A. I couldn't just recall now whether one time or more.

Q. You stated, I believe, that you had a conversation with him? A. Yes.

Q. That conversation related to the filler tanks, did it not? A. Yes.

Q. He asked your permission to seal those filler tanks with wire, did he not?

A. No, he didn't.

(Testimony of Edward Herzinger.)

Q. He did not? A. No.

Q. When you bought the premises from Mr. Brown, would you tell us in addition to the real property what furniture and fixtures you bought with it?

A. You mean enumerate them as they were in the buildings? [315]

Q. Yes.

A. That candy case and cigar case was there.

Q. That was already in the place when you bought it in 1946? A. Yes.

Q. How long before that, do you know?

A. No, I wouldn't know.

Q. Maybe I can help you this way—how about the back bar and the mirrors?

A. That was there.

Q. How about the front bar?

A. That was there.

Q. And the 25 case cooler?

A. That wasn't there.

Q When did you buy that?

A. Possibly the first part of July, '46, my best recollection.

Q. New? A. No.

Q. Used? A. Used.

Q. The three-compartment stainless steel sink?

A. That wasn't there.

Q. Was that purchased by you? A. Yes.

Q. When?

A. I would say the first part of '47, possibly January of '47. [316]

(Testimony of Edward Herzinger.)

Q. Was that used or new?

A. That was new.

Q. The electric refrigerator?

A. I bought that.

Q. When? A. About July, 1946.

Q. New? A. Used.

Q. The coca-cola cooler?

A. That was there.

Q. You don't know how old that was?

A. No.

Q. The 20-foot lunch counter?

A. I brought that down there.

Q. From where?

A. I would say about September, '46.

Q. Used? A. Yes.

Q. The butane gas stove?

A. I brought that down there.

Q. From where? A. Twin Falls.

Q. Used? A. New.

Q. When did you bring it there? [317]

A. I would say about January, '47.

Q. The 3-compartment sink used in connection with the lunch counter? A. I bought that.

Q. From where? A. Salt Lake.

Q. Used? A. New.

Q. When did you bring that there?

A. About January, '47.

Q. The two tables?

A. I brought them down.

Q. From where? A. From Buhl.

Q. Were they new or used? A. Used.

(Testimony of Edward Herzinger.)

Q. The cash register used in connection with the operation of the lunch counter?

A. I brought them down.

Q. Used or new? A. They was used.

Q. Used? A. Yes.

Q. And the cash register that you used in connection with the bar? [318]

A. That was there.

Q. That was already there? A. Yes.

Q. The 15 paintings? A. I didn't get that.

Q. The 15 paintings?

A. The pictures, I brought them down there.

Q. How long had you owned them prior to that time? A. Possibly a year.

Q. The deer heads?

A. They were down there.

Q. Already there? A. Yes.

Q. The bar stools?

A. I bought them in Salt Lake.

Q. When? A. Some time in January, '47.

Q. New or used? A. New.

Q. And the four bar stools as you identified as having no padding? A. I brought them down.

Q. From where? A. From Buhl.

Q. Were they new or used? [319] A. Used.

Q. And this panorama machine?

A. I brought that down.

Q. From where? A. From Buhl.

Q. New or used? A. Used.

Q. Who did you buy that machine from?

(Testimony of Edward Herzinger.)

A. From the Stewart Novelty Company, Salt Lake City.

Q. When?

A. Possibly—I would say the latter part of '44 or first part of '45.

Q. Was it new when you bought it?

A. Yes.

Q. And it had been in operation as of the date of the fire approximately three years? A. No.

Q. When did you buy it, in '44 or '45?

A. I had it in storage in Buhl there. It was operated on and off, part time.

Q. Well, when did you buy it?

A. I said as near as my recollection is '44 or spring of '45.

Q. So at least it was used for the full year of 1945 and the full year of 1946? A. Yes. [320]

Q. And up to the 3rd of May of 1947?

A. Yes.

Q. And you had owned it for at least two and a half years? A. That is right.

Q. You say it was in and out of operation?

A. Yes.

Q. The piano? A. That was there.

Q. This bench along the wall?

A. I brought that down from Buhl.

Q. Was that new or used at the time you brought it there? A. Used.

Q. And the 21 table? A. I brought that.

Q. New or used? A. Used.

(Short recess.)

3:15

Presence of the jury stipulated.

MR. HERZINGER

resumes the witness stand on further

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Herzinger, had you owned any property in Nevada prior to the time you bought the Mineral Hot Springs? A. No.

Q. That was your first business venture in Nevada? [321] A. Yes.

Q. Where did you bring the 21 table from?

A. It came from Contact.

Q. Didn't you testify just prior to the recess that you brought that from Buhl, Idaho?

A. Not the 21 table.

Q. How about the poker table?

A. The poker table was there in the building.

Q. How about the crap table?

A. I brought that down from Buhl.

Q. Buhl, Idaho? A. Yes.

Q. The poker table you say was already on the premises? A. Yes.

Q. That was an old table? A. Yes, it was.

Q. And the crap table, was that old or new?

A. That was new.

Q. Where did you buy it?

A. I had it built in Buhl.

Q. In Idaho? A. Yes.

(Testimony of Edward Herzinger.)

Q. The dining table I believe you referred to?

A. That was on the premises.

Q. When you bought them from Mr. Brown?

A. Yes.

Q. And the six chairs?

A. Possibly about three of them were there and I brought about three, probably three older chairs. I know of bringing some but I can't say as to just how many.

Q. The chairs that you brought in, were they new or old? A. They were used chairs.

Q. Then there was a two-burner fuel stove?

A. I brought that down.

Q. Used? A. New.

Q. How much did you pay for that?

A. With the fixtures and connections approximately $200.

Q. When?

A. I would say about August, '46, my best recollection.

Q. Then the light fixture which was over one of the gambling tables. Which table was that over?

A. Over the crap table.

Q. Was that used? A. New.

Q. And a Wurlitzer music machine?

A. I brought that down.

Q. What is that?

A. Well, some sort of juke box. It is a music machine like they have in all these amusement places. [323]

(Testimony of Edward Herzinger.)

Q. Was that on the premises the day of the fire? A. Yes.

Q. Where?

A. The back end of the building.

Q. Of which building? A. Of the bar.

Q. Was it in use? A. Yes.

Q. As I understand it then, in the bar you operated the juke box and a moving picture machine?

A. Yes.

Q. Were they two separate things or were they one? A. Yes, two separate ones.

Q. And that was used? A. Yes.

Q. The slot machines?

A. I brought them down.

Q. From Buhl? A. From Wells.

Q. Who did you buy them from in Wells?

A. Harry Simon.

Q. When?

A. The fall of '46, I would say, possibly August or September, my best recollection.

Q. Were they new or used? [324] A. New.

Q. The silverware and dishes?

A. I brought them down there.

Q. Were they used?

A. Part of them was used and part of them was new.

Q. You refer to a panorama kit, what is that, Mr. Herzinger?

A. That is repair kit with lots of, I would say, delicate parts of that panorama, the thing that you

(Testimony of Edward Herzinger.)

repair the panorama with and parts in addition for panoramic pictures.

Q. And by the panorama you mean the moving portion of that combined music and moving picture machine? A. Yes.

Q. Now tapestry and Christmas decorations. Describe the tapestry for me.

A. Oh, just like any other tapestry. It was on the walls.

Q. What size was it?

A. Varied sizes, from 2 by 4 feet, maybe some 3 by 4 feet; had a picture of a big lion on there, and just ordinary tapestry like you have in places.

Q. Were they on the place when you bought it, or did you bring it with you?

A. I brought it with me.

Q. They were used when you brought them?

A. Not the Christmas decorations. The tapestry was used, but not the Christmas decorations.

Q. What did the Christmas decorations consist of?

A. They were these colored bulbs that you put on Christmas trees and all the decorations you hang on Christmas trees. [325]

Q. Tinsel and little ornaments?

A. Yes, and ornaments.

Q. And then there was a burglar alarm system?

A. I put that in.

Q. When?

A. In the fall of '47—'46, pardon me.

Q. Describe that for me.

(Testimony of Edward Herzinger.)

A. Well, it consists of some transformers and fixtures and bells, bell cord and buttons that you put in different places where you can touch them to signal different places in the cabins if there is any trouble; also to call if there is a telephone call for me, buzzer to my cabin and switches on it. If the door was ever opened, it would throw a switch on and give an alarm into the cabins.

Q. Was that electrically operated?

A. It was when it was operating.

Q. Can you, by coming to this blackboard, designate where these transformers were, the buzzers were, the buttons were and where the switches were?

A. I could quite close.

Q. Would you do it please?

A. We had a couple of transformers back on this lean-to and these wires led to this door of the lean-to and it led up here to these windows and doors in there, also it carried through the building and over into this cabin here, the 12 by 12 cabin, and it branched off into the bar room and was connected to this door.

Q. By that you are referring to the front door?

A. Front door of the bar room. Then there was some buttons coming underneath the bar, around underneath the lunch bar, and button underneath the bar in the grocery store, and wires came across here to the cabin where I was located, the bell and buzzer in that cabin.

Q. Would you take the chalk and mark the location of the transformers?

(Testimony of Edward Herzinger.)

A. On the back wall of the lean-to.

Q. Then, Mr. Herzinger, you made reference to some appliances, a portion of the burglar alarm system, in relation to the windows. What do you mean?

A. If the window would be opened, there was a switch—if the window should be opened it would connect under the switch, making contact, which would ring a bell.

Q. It would cause an electric current?

A. Well, there would be a current in there, you have contact down here and has a little direct current, just like a little door bell. You couldn't operate that on your 110 volt current.

Q. That was separate? A. Yes.

Q. And these switches that you say created a contact and start off an alarm, were generally situated near your windows [327] and your doors?

A. Yes.

Q. In case of opening? A. Yes.

Q. Then you refer to a set of fire extinguishers. Were they there when you came there?

A. Yes, they were there.

Q. What did this set consist of, how many extinguishers?

A. Just off-hand I can't tell you.

Q. Your best recollection, Mr. Herzinger?

A. As to how many?

Q. Yes. A. I would say 20 or possibly 25.

Q. Where were they located?

A. All through the bar room and grocery store.

(Testimony of Edward Herzinger.)

I think, but I wouldn't say for sure, in the cabin, but they were scattered all through there.

Q. How many fire extinguishers were in the bar room? A. I would say possibly twelve.

Q. Would you come down and designated their location? A. Yes.

Q. You might designate them using the letter "F."

A. That is about to the best of my recollection where they were.

Q. Now, Mr. Herzinger, to the best of your recollection how [328] many were in the grocery store?

A. I would say possibly six.

Q. Would you designate them by the use of the letter "F"?

(Witness complies.)

Q. Then you refer to those panorama films. Were they films that you could change in connection with the use of the movie machine? A. Yes.

Q. And did they come with the machine?

A. No, I have to buy them separate.

Q. You bought them later or about the same time?

A. I would buy them at various times.

Q. Then you had a two-wheel beer cart.

A. That was on the premises.

Q. That was on the premises when you took them over? A. Yes.

Q. How about the glasses that you used in connection with the operation of the bar?

(Testimony of Edward Herzinger.)

A. I brought most of them down there from Buhl.

Q. Wasn't there some glassware there when you took the place over?

A. There was some glassware there. I had to buy that from the party also.

Q. The adding machine, was that old or new?

A. It was seldom used. [329]

Q. Now the brooms, mops, etc., I imagine you just bought from time to time as you needed them, isn't that right? A. Yes.

Q. Now the grocery counter?

A. It was there.

Q. That was on the premises when you bought them? A. Yes.

Q. And the article that you describe as back counter? A. That was there.

Q. Is that the shelving?

A. Yes, shelving and bottom drawers and all that.

Q. And the grocery scale?

A. I brought that.

Q. Was that used? A. Yes.

Q. And the kerosene refrigerator?

A. That was on the premises.

Q. Tell me, Mr. Herzinger, how did that kerosene refrigerator work?

A. All I could tell you it had a small wick and it had a small tank where you poured some kerosene into that and this kerosene had to flow to this wick and then you would light the wick.

(Testimony of Edward Herzinger.)

Q. And then there would be an open draft?

A. Well, there was a drum. With the drum you couldn't see [330] the flame.

Q. You removed the drum or container to light the wick and then you put it back on, is that right?

A. Yes.

Q. The Diesel parts?

A. I bought them.

Q. From time to time as you needed them?

A. Yes.

Q. The cash register in the grocery store?

A. I bought that.

Q. Was that used? A. It was used.

Q. Then you refer to a large icebox. I imagine that is the one that was in the lean-to there?

A. Yes, that was there.

Q. Was that already there when you bought the place? A. Yes.

Q. Two cream cans?

A. They was on the premises too when I bought the place.

Q. Light bulbs I imagine you bought from time to time? A. Yes, I bought them.

Q. Then you had in the oil house you designated two barrel pumps? A. I bought them pumps.

Q. Who from? [331]

A. I don't know what the company is, but I bought them off Rube Brown.

Q. Did you buy them from Rube Brown or Ernie Odermatt, the defendant in this action?

A. I can't say for sure where they came from. It might be I bought them from Ernie Odermatt.

(Testimony of Edward Herzinger.)

Q. You listed them as $40? A. Yes.

Q. I will ask you if it isn't a fact that you bought them from Ernie Odermatt and you paid $5.80 for each one, or a total of $11.00 at the time you bought them?

A. I have no recollection I paid anything like that.

Q. It might be? A. It is possible.

Q. The air compressor?

A. It was on the premises.

Q. The large vise?

A. I bought that large vise.

Q. Was that used or new?

A. It was slightly used.

Q. And the two hydraulic jacks?

A. I bought them.

Q. Were they used or new? A. New.

Q. And the vulcanizing set? [332]

A. I bought that.

Q. Used or new? A. New.

Q. The two gas lanterns?

A. I brought them down.

Q. And were they used or were they new?

A. They were new.

Q. Then you listed certain properties in the cabin. You referred to two bed springs, mattresses and bedding. Were they on the premises when you purchased the Mineral Hot Springs? A. No.

Q. And you brought them there? A. Yes.

Q. And were they used or new? A. New.

Q. When did you bring them there?

(Testimony of Edward Herzinger.)

A. The first part of January, 1947.

Q. About five months prior to the fire?

A. Four months.

Q. The two alarm clocks?

A. I brought them down.

Q. Used or new? A. New.

Q. And the fuel oil stove? [333]

A. I brought it down.

Q. Used or new? A. New.

Q. Now you refer to personal belongings valued at $400. Whose personal belongings were they?

A. They really belonged to the employee that had that cabin.

Q. They were not yours?

A. They wasn't mine personally. They belonged to him.

Q. They were located in this 12 by 12 cabin?

A. Yes.

Q. So that $400 item was a loss sustained by one of your employees, isn't that correct?

A. Well, at the time it was, yes.

Q. Now in the basement you said you had a half-horse compressor? A. Yes.

Q. And was that there when you came on the place? A. No.

Q. You brought that there? A. Yes.

Q. Was that used or was it new?

A. It was slightly used.

Q. Then you said you had a complete network of piping? A. Yes.

Q. By the way, do you mean the installation of

(Testimony of Edward Herzinger.)

pipes for the [334] purpose of furnishing water to the various buildings?

A. Yes, and the drains and the faucets and all pipes connected to them, the vent pipes.

Q. They were what you refer to as plumbing generally in the house, is that correct?

A. Yes.

Q. Was that in place?

A. No, I put that in.

Q. Did Mr. Brown have any?

A. Not to speak of. At the time I bought the place he had no drains whatever.

Q. And you installed that as an improvement to the premises? A. Yes.

Q. Then you had a hot water tank?

A. I brought that down.

Q. What kind of hot water tank?

A. A butane.

Q. Was that open flame?

A. Well, the flame was enclosed. You couldn't see the flame. There was a door you had to open.

Q. Where was that located, in the basement?

A. Oh, close to the south wall.

Q. And toward the west or how?

A. Oh, possibly 20 feet from the east wall and possibly six feet from the south wall. [335]

Q. And in the southeast corner of the building, is that correct? A. Of the basement.

Q. Of the basement, rather.

A. Yes, that is correct.

Q. Then there was a small table? A. Yes.

(Testimony of Edward Herzinger.)

Q. And was that there when you bought the place from Brown?

A. No, I brought that down.

Q. Was it a used table, Mr. Herzinger?

A. Yes.

Q. Then I believe you then began to describe articles which were in the pump house?

A. Yes.

Q. You said a small electric plant?

A. Yes.

Q. Was that new or used?

A. That was used.

Q. That is what Mr. Brown had, wasn't it?

A. Yes, it was.

Q. And a water pump?

A. Yes, that was on the premises when I bought the place.

Q. The garden hose?

A. I bought that. [336]

Q. So that other than the garden hose, everything which was contained in the pump house had actually been there at the time you purchased the premises? A. Yes, in the pump house.

Q. Now at the time you bought the place from Mr. Brown, did you take into consideration, in fixing your price, all of these articles which were there and which you have listed as having been there? Did you inventory the place and put a value on it before you made him an offer?

A. On these items we were describing?

Q. What I am driving at, when you bought the

(Testimony of Edward Herzinger.)

place did you fix in your own mind that these eight deer heads were worth $400 and therefore fixed that price in your purchase price?

A. Well, in general we discussed it with Rube Brown. I discussed with him the value he put on the property.

Q. And that included eight deer heads valued at $400?

A. Approximately valued at $400.

Q. Do you have any idea how old those deer heads were? A. No, I don't.

Q. Well, you know they were in existence as early at least as 1946?

A. Yes, they were there before.

Q. Now you listed the value at $10,900?

A. Approximately.

Q. How did you carry this on your books? [337]

A. I don't know how do you mean, on the books?

Q. Well, in determining the net value or net worth of your business, what value did you place on all of your property for the purpose of your own accounting?

A. I could keep track of what that amount would be in there.

Q. I will ask you to state what system of depreciation you had for taxation purposes?

A. That I couldn't tell you off-hand.

Q. Did you ever depreciate the property, or your accountant?

A. Possibly my accountant did. He done all that work for me.

(Testimony of Edward Herzinger.)

Q. And your accountant, I presume, helped prepare your accounts in such manner that he could take care of that depreciation, that is, for the purpose of taxation?

A. He must have. I didn't prepare them. He done all my book work.

Q. The information with which he did that, however, he received from you, isn't that correct?

A. Yes, he did.

Q. In your books did you carry an account referred to as "Furniture and Fixture" account?

A. Not to my knowledge, I didn't.

Q. Then, Mr. Herzinger, how did your accountant depreciate the furniture and fixtures from year to year for taxation purposes if you had no furniture and fixture account?

Mr. Parry: Objected to as assuming several things [338] not in evidence and argumentative. Improper cross-examination.

The Court: Objection sustained.

Q. Who makes out your income tax returns, Mr. Herzinger? A. Willard Bowen.

Q. Is he an accountant? A. Yes.

Q. What is his address?

A. Pocatello, Idaho.

Q. How long has he been keeping your accounts?

A. I would say approximately 15 years.

Q. Now over that 15-year period has he kept a complete set of books for you, including monthly receipts and disbursements?

A. As to my knowledge, I wouldn't know. He

(Testimony of Edward Herzinger.)

should have because he gets out the paper he sends me that I have to send to my collector of internal revenue.

Q. You may not have understood me, Mr. Herzinger. I mean in keeping your accounts for you, did you furnish him all the invoices, all the receipts from monies paid out?

A. You mean if I took the books or just the receipts up to him?

Q. Yes.

A. I would take the books up there.

Q. The books were kept by you?

A. Well, they were kept by my employees first and I would have to get information from the books from my employees. [339]

Q. In other words, your books were maintained by your employees. From them you would ascertain your income and disbursements and then that information you would in turn give to Mr. Bowen, from which he would prepare your returns?

A. Yes.

Q. Did he do any other work for you in the way of accounting, other than your income tax work?

A. No.

Q. So you probably went to see him about once a year, is that correct? A. Yes.

Q. And the books kept in connection with the operation of the Mineral Hot Springs were kept where, Mr. Herzinger?

A. At Mineral Hot Springs.

Q. And by whom were they kept?

(Testimony of Edward Herzinger.)

A. Mr. Moseley.

Q. And do you know in what part of the premises he kept them?

A. He generally kept them right by the cash register, where I generally seen them, or possibly the drawer underneath the cash register, back of the bar.

Q. What ledgers did he keep?

A. Ledger book and pay-day book.

Q. Did you testify that you operated slot machines six or seven years prior to the fire?

A. Yes. [340]

Q. Where?

A. Some in Buhl, around Buhl.

Q. That is Idaho? A. Yes.

Q. Where else?

A. The Ice Cave Service Station.

Q. What town is that?

A. That is north of Shoshone on Highway 93 on the way to Sun Valley.

Q. This trailer house which is marked with the letter "T," was that there when you bought the premises? A. No.

Q. When did you get title to that, or when did you get possession of it? When did you buy it?

A. It must have been the latter part of December, '46.

Q. Was that new or used?

A. It was used.

Q. What kind of a trailer house was it?

(Testimony of Edward Herzinger.)

A. Well, it was no factory made trailer house, had no name, so I just couldn't tell you.

Q. Was it a home-made one?

A. Made, I presume, by some carpenter, cabinet maker.

Q. And constructed of wood? A. Yes.

Q. Four wheel or two wheel? [341]

A. Two wheel.

Q. By the way, did you help Mr. Moseley make this sketch? A. On the board there?

Q. Yes. A. I held the ruler for him.

Q. Did you tell him the general set-up? Did you help him in that?

A. Not in the general set-up I didn't.

Q. Mr. Herzinger, I am going to hand you a document which is on file in this case, which is called a bill of particulars, which purports to set out in detail those items which it is alleged you lost as a result of the fire. Now, did you assist in the preparation of that bill of particulars by furnishing to whoever prepared it here some invoices and receipts and bills which you identified today and have now been made part of the record?

A. Yes.

Q. So that this then should correspond or be accurate when compared with these other invoices that we talked about, these receipts, these bills?

A. Yes.

Q. These photographs, Mr. Herzinger—you may have so testified and I don't remember it—when did you say you took these?

(Testimony of Edward Herzinger.)

A. The next day after the fire.

Q. That would be May 4th? [342]

A. Yes.

Q. And at about what time?

A. Oh, it could have been ten o'clock, eleven o'clock, twelve, along in that time.

Q. Between ten and twelve that morning?

A. As near as I can recollect it.

Q. Now, Mr. Herzinger, do these pictures accurately represent the condition of the premises as you saw them the afternoon of the third, after you had been notified of the fire and went to your place?

A. There could have been some slight changes.

Q. I want you to examine—save and except, however, I understand the wire remains of that hose, which were in the basement, that was not there? A. That was not there.

Q. Other than that, would you examine these and tell me whether or not those pictures represent the scene as it was the afternoon of the 3rd when you went to your place at Mineral Hot Springs, after being notified of the fire?

A. Outside one or two minor things, I would say yes.

Q. Would you tell me and the jury in what respects were those minor changes or what differences?

A. For one thing, over here is a wire stretched across here between the ruins and the highway and some rags hung on the wire so that if somebody should drive in at night they wouldn't [343] drive over the ruins, which I put there.

(Testimony of Edward Herzinger.)

Q. So that on Plaintiff's Exhibit 25 the only change that you would make would be the wire extending across the driveway so as to prevent cars from accidents, is that correct?

A. That is correct.

Q. What changes would you make on Plaintiff's Exhibit 19? A. There would be this hose.

Q. So that, other than the presence of the hose, this would be the same as it was the night that you saw it, that is, the night of the 3rd at four o'clock?

A. I don't see any change.

Q. Showing you Plaintiff's Exhibit 23, would you recommend or make any changes as to that?

A. Just for the same purpose, that I put a stick down here and stretched this wire across here for the same purpose of keeping cars from driving down there at night.

Q. So other than the barricade, which was a wire and stick, the rest of that is the same as you saw it that afternoon of the third?

A. Yes, the ruins is.

Q. And Plaintiff's Exhibit 21?

A. I can't see any change in that outside of some people standing there. That has that same wire stretch out.

Q. So other than the people standing there, presumably wanting to get into the picture, that is substantially the same? [344]

A. Approximately.

Q. And Plaintiff's Exhibit No. 20?

(Testimony of Edward Herzinger.)

A. I would say it would be about the same, outside that post I probably had set in there.

Q. That is that area to keep cars from driving in?

A. Yes, and possibly that filler hose could have laid by this tank here the day before, which doesn't show in the particular picture at the present time.

Q. And No. 18?

A. I would say that is the same, outside a car or two.

Q. Other than the automobiles you see in this photograph, the rest is the same as you saw it that afternoon? A. Yes, I would say it is the same.

Q. For the sake of time, Exhibits 22 and 24?

A. I would say they are the same, excepting there had been a hose with a filler pipe and this receiving pipe.

Q. That is referring to Exhibit 24, but Exhibit 22 is the same, is that correct?

A. Just the same as I seen it there before.

Q. Did you see Mr. Odermatt on the 4th of May, 1947, that was the day following the fire?

A. I don't recollect seeing him on that day.

Q. Did you see a Mr. Werner on that day?

A. No, I don't recollect seeing Mr. Werner.

Q. Did you remain at Mineral Hot Springs all of the next day? [345]

A. I was there the biggest part of the time. Part of the time there and part of the time gone.

Q. Where to?

A. Oh, made one trip to the postoffice at Contact. Made a trip to Ray King's.

(Testimony of Edward Herzinger.)

Q. Oh, I am sorry—you did not leave——

A. You mean leave for good?

Q. Yes.

A. Not that I can recall, no.

Q. By the way, Mr. Herzinger, what kind of a camera did you use to take these photographs?

A. You mean the name of the camera?

Q. Yes.

A. That I couldn't tell you.

Q. What size?

A. I couldn't tell you as to size.

Q. Was it your camera?

A. No, it was not my camera.

Q. Whose camera was it?

A. I had two cameras, one belonged to Mrs. Black and the other belonged to Mrs. Lou Robbins.

Q. And Mrs. Black? A. Yes, sir.

Q. And who took the pictures?

A. I did. [346]

Q. Whose camera did you use?

A. I used both the cameras.

Q. Who developed them?

A. They were developed in Buhl and I just can't place that photographer's name.

Q. And that was on May 4th, the next day?

A. That I took the pictures, yes.

Q. I believe you stated that following the fire you didn't set up any type of business for about six or seven days?

A. To the best of my recollection that is about what it was.

(Testimony of Edward Herzinger.)

Q. And that when you did, it was in this cabin which was to the east of the burned portion of your property? A. Yes.

Q. And in that you set up a temporary bar and a grocery store, is that correct?

A. Very little groceries there because there wasn't any room for groceries. I just set up a little temporary.

Q. And slot machine?

A. I had two old used slot machines.

Q. Where were they?

A. Against the east wall in that building.

Q. What building?

A. That same building I opened up in the little cabin.

Q. Where had they been prior to the fire?

A. Over in Buhl, Idaho. [347]

Q. Now your testimony is that that bar was not in operation, this temporary bar, was not in operation the day of the fire? A. It wasn't.

Q. It was not? A. No.

Q. I will ask you to state if you recall having a conversation with Ernie Odermatt in that temporary bar the same afternoon of the fire?

A. No, I didn't.

Q. Would you say that you didn't?

A. I didn't.

Q. You did not? A. No.

Q. When you went on the premises the afternoon at four o'clock, I will ask you to state if you

(Testimony of Edward Herzinger.)

saw any evidence of drinking by any one who was there? A. I can't recall any one drinking.

Q. How long did you remain or do business in this temporary bar?

A. I would say possibly 60 days, to the best of my knowledge.

Q. That would have brought it to the latter part of July? A. Possibly in there.

Q. And then where did you move into?

Mr. Parry: If the Court please, it seems to me, in view of the Court's ruling on lost profits, this is immaterial. [348] Our position is this—true, we started into this on direct examination, endeavoring to lay a foundation for lost profits. We were unable to get the facts, as your Honor ruled, so we did not proceed on that. There is no evidence now of any claim of lost profits.

The Court: I can't see the materiality of operations there after the fire.

Mr. Puccinelli: If your Honor please, as I understand the pleadings of counsel, it is contended that as a result of the fire there was a period of time when he was forced to operate under restricted circumstances. I am prepared to show, by way of cross-examination, that there was a second fire at Mineral Hot Springs during the year 1947, which stopped him from doing business.

Mr. Parry: We say that is all immaterial because all lost profits issue was withdrawn from the jury. It doesn't make any difference if there were a dozen fires.

(Testimony of Edward Herzinger.)

The Court: Do I understand counsel has withdrawn the issue of lost profits?

Mr. Parry: Yes, your Honor.

The Court: Do I understand the question of lost profits is out of the case?

Mr. Parry: Yes, your Honor.

Q. Finally you moved into the new building Friday, December 26, 1947, is that correct? [349]

A. Yes, sir.

Q. You testified further, Mr. Herzinger, on direct examination, that your chief source of income was from the U. C. Land and Cattle Company?

A. Yes.

Q. In what way?

A. They employed a lot of employees because they ran a lot of cattle and put up lots of hay and they had ranches scattered all through the valley there and the payroll was exceptionally large all through that part of the country.

Q. Thus, as a matter of fact, while the U. C. Land and Cattle Company was in operation there, their payroll represented the largest source of income to that entire portion of the country?

A. It did.

Q. When did the U. C. Land and Cattle Company wind up its business and begin to lay off men?

A. To my best knowledge they started liquidating some time in 1947 and I think they were through the latter part of '47.

Q. Isn't it a fact, Mr. Herzinger, that the greater part of the winding of the business and closing of

(Testimony of Edward Herzinger.)

the ranching and the letting go of men and employees had been practically completed in the spring of 1947?

The Court: Pardon me, the question of profits is not to be considered. How is this material?

Mr. Puccinelli: He maintains by his direct [350] examination, as does counsel, that because he was there in business and became the U. C. Land and Cattle Company had this terrific payroll, he was denied the privilege, by virtue of the fire, of serving all these employees of the U. C. Land and Cattle Company.

The Court: Wouldn't that go back to the question of profit?

Mr. Puccinelli: That is correct.

The Court: And don't I understand that profits is out of the case?

Mr. Parry: That is correct.

Mr. Puccinelli: Maybe I didn't know how generous counsel was. Am I to understand that counsel has waived their claim of lost profits?

Mr. Parry: If the English language is clear, we have.

Mr. Puccinelli: Then I withdraw the question.

Q. I show you what has been marked as Plaintiff's Exhibit 20 for identification and I will ask you to state if that photograph shows the remains of the fabric of the hose?

A. Yes, I can see a few imprints of the fabric.

Q. Would you take this pen and outline, to the best of your ability, on that picture the fabric of

(Testimony of Edward Herzinger.)

the hose? (Witness complies) Would you mark the beginning of that line with an "X"? (Witness complies) Would you please identify this large dark object and this other one? [351]

A. This is the remains of a gas pump and this is the small island it sets on, concrete.

Q. You heard Mr. Moseley testify that the slot machines yielded about $100 a day?

A. That is not my recollection.

Q. Was that reported to the Nevada Tax Commission?

Mr. Parry: I think that is improper cross-examination.

Q. How much did you make off the slot machines?

Mr. Parry: That is not proper cross-examination. Not gone into with this witness on direct. It is immaterial since profits were withdrawn.

The Court: I can't see where that is proper cross-examination. It wasn't brought out on direct.

Mr. Puccinelli: This simply goes for the purpose of a substantial claim made by the plaintiff as to monies contained in the slot machines and which he lost.

The Court: Very well, the ruling will be withdrawn and I will overrule the objection. You may inquire.

Q. To the best of your recollection, Mr. Herzinger, what did those slot machines yield daily?

A. What part of the year would you be referring to?

(Testimony of Edward Herzinger.)

Q. On an average, or if you want to restrict it to the date of the fire, in the months of April and May?

A. I would estimate that as about——[352]

The Court: (Interrupting) I ruled on that same question and the objection will be sustained.

Mr. Puccinelli: Do I understand now that the objection is sustained?

The Court: Yes, because the same question was brought up on direct examination and there was an objection to it. I have other reasons, the one that it is not proper cross-examination. I don't see how you can get an accurate estimate of how much fixed.

Mr. Puccinelli: That is the intent of the Act, that you are to make an accurate report of gambling returns and pay a two per cent tax on it.

The Court: Well, the objection will be sustained. If you have any reason to find out what he reported, I would not rule against that, but to have a man testify what a gambling game is going to earn in a specified time, I don't want that kind of testimony.

Mr. Halley: If we may explain our reason: It is my recollection Mr. Moseley stated the machines were taking in about $100 a day at that time, which substantiated his statement that he had in the slot box approximately a thousand dollars and Mr. Herzinger had not been by for a period of about ten days and he accummulated this money, and we [353] wanted to show or inquire if the machines were

(Testimony of Edward Herzinger.)

making $100 a day, if Mr. Herzinger had reported that to the Nevada Tax Commission.

The Court: You can inquire as to what these machines were making, but not what, from his experience, a certain set of slot machines ought to make at a certain time. Let us have the question.

Mr. Parry: As I understand the record was this, Mr. Herzinger stated he had not opened the slot machines for ten days and he had the only key, and then, as your Honor mentions, when we tried to inquire to show the money, objection by counsel was sustained. There is nothing in direct examination of this witness and we think it is improper cross-examination to ask this witness about what another witness said.

Mr. Halley: Mr. Moseley was asked, when examined along that line, whether or not any reports were made on the tax for it and he said Mr. Herzinger took care of those matters, so now we have Mr. Herzinger here and we are wondering if he did make the tax reports to the Tax Commission on these slot machines.

The Court: The reason for my ruling was I did not want evidence as to what a man, acquainted with a gambling machine, would know as to what it ought to earn in a certain period of time. I do not think we want evidence of that kind here.

Mr. Halley: We quite agree with you on that. [354]

The Court: Now what is your question?

Mr. Halley: We wanted to know if Mr. Her-

(Testimony of Edward Herzinger.)

zinger made a report to the Tax Commission on the take of the slot machines during the quarter in question here.

The Court: You can answer that question.

Mr. Wilson: Is that a material question as to the issues involved in this case?

The Court: There is some evidence in this case as to certain quantity of money being in these slot machines. Probably it is a preliminary question. It may be material.

Mr. Daly: Isn't there evidence in the record it took $300 to load the machine and weren't we restricted in our attempts to show there was any more money in those machines than what it took to load them originally? It is my memory the Court ruled, when we intended to show any more money in those slot machines, against our contention there was any more.

The Court: I do not think I ruled with that thought in mind.

Mr. Halley: Maybe I have not made myself clear and maybe I am not correct on the evidence, but as I remember it, Mr. Moseley testified that he had approximately a thousand dollars in this so-called fishing tackle box, which he called the slot box, pertaining to the slot machines, and he also had testified that Mr. Herzinger had not been by for a ten-day [355] period and he kept this amount of money there, took care of the receipts of the slot machines, etc., and he was then asked if over a ten-day period had the slot machines made a thousand dollars over

(Testimony of Edward Herzinger.)

that particular period and he said they averaged about $100 a day, if my recollection is correct. Then he was asked if reports had been made to the Nevada Tax Commission concerning the profits and operation of the slot machines and if my recollection does not fail me, he said Mr. Herzinger made those reports, and the only thing we want to know from Mr. Herzinger now is whether or not he made the reports that Mr. Moseley said he does make to the Nevada Tax Commission.

Mr. Daly: I think counsel's explanation shows that is not proper cross-examination of this witness.

The Court: Doesn't it tend to show how much money was in those slot machines at that time, or in that slot box, either one of those two places, either in the slot machines or in the slot box?

Mr. Daly: If the Court please, I believe Mr. Herzinger's testimony is that he was the only one that had the key to the slot machines and he had not been there to remove any money from the machines for ten days; and the Court will also remember he was not allowed to testify as to the contents of the slot box, as we call it, because he didn't know of his own knowledge what was in there. [356]

The Court: Will you just state your purpose for that question, Mr. Halley?

Mr. Halley: This, your Honor, Mr. Moseley, when he was on direct examination by counsel for the plaintiff, stated that there was under the counter the sum of $800 and slot machine money approximately a thousand dollars. He stated that the take

(Testimony of Edward Herzinger.)

on the machines for ten days averaged $100 a day and he was justifying the thousand dollars that was there showing a loss here, as I remember, this money they claim that was lost, whatever was taken in by the slot machines during that period, the period that Mr. Herzinger had not been there, the ten day period. That is in evidence and no objection was made and counsel for the plaintiff brought it out at that time. He was then asked, if the Court please, as I recall, if reports were made to the Nevada Tax Commission concerning the take on the slot machines. At that time he said Mr. Herzinger made the report.

The Court: The purpose of the inquiry whether the report was made is to find out whether there is a means of ascertaining how much money was in that slot box at that time in evidence?

Mr. Halley: The evidence is in there was a thousand dollars by Mr. Moseley and that these reports, Mr. Moseley didn't know anything about reports, he said his employer made the report, so we would like from Mr. Herzinger if he has made [357] those reports Mr. Moseley referred to.

The Court: Answer the question.

Mr. Daly: What is the question?

Q. (By Mr. Puccinelli): Did you make a report of the proceeds of any gambling to the Nevada Tax Commission for the first and second quarters of 1947?

Mr. Daly: We object to the question because it

(Testimony of Edward Herzinger.)

has absolutely no materiality to any issue in the case.

The Court: Ordinarily it wouldn't, but there is a claim here there was a thousand dollars in that slot machine box and there is testimony that Mr. Herzinger had not been there for ten days and when he was last there he took the money from that slot box. Now the slot machine box is evidently supplied from the slot machines.

Mr. Wilson: I don't believe that was the testimony. I believe it was a box used for coin to supply coins working into and out of the machines and I believe that was the testimony that he had given.

The Court: There was a thousand dollar bank roll.

Mr. Wilson: Yes, and they drew that down and kept that bank roll in there.

The Court: Well, I will allow the question.

Mr. Wilson: May I make one other observation on this?

The Court: Yes. [358]

Mr. Wilson: As I see it, any statement which is required to be made wouldn't evidence what was there that day, because I presume those returns have accumulated over a period of weeks or months, so just how we can connect up this particular filing or lack of filing with that day's proceeds or that day's accumulated supply of money, I don't see.

The Court: I don't know what we will find out

(Testimony of Edward Herzinger.)

as a result of the answer to the question, but I am going to allow the question to be answered. You may answer the question.

Mr. Daly: Do you know what the question is?

(Question read.)

The Court: Answer that yes or no.

A. No.

The Court: We will be in recess until Monday morning at 10:00 o'clock.

Court recessed at 4:30 p.m.

Monday—February 13, 1950 10:00 a.m.

Presence of the jury stipulated.

All attorneys present.

MR. HERZINGER

resumed the witness stand on further

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Herzinger, in the statement of your own insurance, did you make out a proof of loss and submit it to your insurance [359] company?

A. I did.

Q. Do you have a copy of that proof of loss?

A. I don't have it with me.

Q. You say you don't have it with you?

A. I don't know what you mean, copy of proof of loss. Do you mean a report of the fire?

Q. Well, at the time you were dealing with the

(Testimony of Edward Herzinger.)

insurance agent you went over what had been lost and the respective values of the items, isn't that correct? A. Not to my knowledge.

Q. Did you make a settlement with the insurance company? A. Yes, I did.

Q. And what did you use as a basis of the settlement?

A. The only thing I know of is the insurance papers.

Q. Including the insurance papers, didn't you make out a listing of the buildings you had lost, what value they had, so that insurance company could be advised as to what you had lost?

A. Well, on the insurance papers the buildings were listed on there and so much insurance on the buildings.

Q. Now isn't it a fact that at the time you made the settlement with the insurance people that you depreciated the building 50 per cent on the basis of 15 years? A. No. [360]

Q. Did you sign that proof of loss?

A. You mean with the insurance company?

Q. Yes.

A. Not to my knowledge, I never signed no proof of loss with the insurance company.

Q. Mr. Herzinger, do you know how old those buildings were?

A. No, I wouldn't have any idea.

Q. You don't know how long prior to the time you took the place over the buildings had been constructed on that place?

(Testimony of Edward Herzinger.)

A. I had some idea how long they had been at that place. Whether they were new buildings at the time though, I don't know.

Q. What is your knowledge or information how long they had been at that particular place?

A. Possibly eight years prior to my purchase.

Q. Eight years prior to 1946 or 1945, was it that you bought there? A. '46.

Q. So eight years prior to 1946. They were frame buildings, were they not? A. Yes.

Q. Mr. Herzinger, you know Mr. Whitney, don't you, the insurance man that talked to you at your place of business?

A. I possibly met him about twice.

Q. Isn't it a fact that in your negotiations with Mr. Whitney [361] you reached an agreed figure as to the value of the buildings which you lost and that that agreement was reached between you and Mr. Whitney in Wells following the fire?

A. I don't think we agreed on any value of the buildings.

Q. Did you sign any document at all or any paper at all for Mr. Whitney in connection with your settlement with the insurance company of what you had lost?

A. I have no knowledge of it.

Q. I will ask you to state, Mr. Herzinger, if it isn't a fact that in settling with Mr. Whitney on the buildings, No. 1, which was the bar you designated a value of $3600 value; No. 2, grocery store,

(Testimony of Edward Herzinger.)
you put a value of $1984; building No. 3, $517.50, and building No. 4, $1104?

A. Did I place a value on them?

Q. Yes, and agreed with him that that was a fair settlement figure?

A. I have no knowledge of any agreement.

Q. When you purchased the place originally in 1946 from Mr. Brown, what values did you place upon these various buildings, furniture and fixtures, so as to determine the purchase price that you paid to Mr. Brown?

A. As I recall, we didn't set any values on any certain parts.

Q. Just what did you take into consideration, Mr. Herzinger, in determining for yourself what you were willing to pay for the business? [362]

A. Oh, judging by the amount of business he had there.

Q. And what else?

A. Well, the property on the place. That is about all you ever go by when you buy a place of business. A person has a place for sale and you want so many dollars for it, you walk in there and look at his business and you decide whether it is worth that or not.

Q. So that in negotiating with Mr. Brown, you took into consideration his volume of business as one factor, and then you took into consideration as another factor the value of the property, is that correct? A. Yes.

(Testimony of Edward Herzinger.)

Q. What value did you then place on the buildings?

A. Didn't place any value on the buildings, that is, not any figures.

Q. Didn't you determine for yourself, in negotiating for the purchase of this property, what the bar was worth or the grocery store was worth or the first cabin was worth and the oil house, in dollars and cents? A. No, I didn't.

Q. So then we can conclude from that that in determining how much money you would pay Mr. Brown, you gave no thought whatever to what the improvements were worth. That wasn't important to you at that time?

A. Well, it was important, but I didn't give it a thought except [363] for the part of the deal.

Mr. Puccinelli: I have no further questions.

Cross-Examination

By Mr. Platt:

Q. Mr. Herzinger, do you know whether any of the gasoline in the tanks took fire? By that I mean the gasoline that was actually in the tanks in front of your place or near your place?

Mr. Parry: If I might interpose an objection—Mr. Herzinger wasn't there and it wasn't gone into on direct examination.

Mr. Platt: He may have some knowledge.

The Court: What is the question?

(Question read.)

(Testimony of Edward Herzinger.)

The Court: Objection overruled. Answer the question.

A. I would have no knowledge of that, for the simple reason I was not there. When I did get to the place, there was no more blaze around there, just smoldering.

Q. Did you make an investigation after you arrived at the scene of the fire to learn what happened to any gasoline that was in the tanks, if any?

A. I did not.

Q. Do you know whether any adjustment was made with you with respect to the value of such gasoline that had been delivered to you? [364]

A. No, I don't.

Q. Did you make any effort, or do you know of any effort having been made, for reimbursement to you for gasoline that was later extracted from the tanks?

A. I have no knowledge of anything personally.

Q. Could you tell us whether your buildings were covered with a tar paper roof or what?

A. A composition roof.

Q. Composition? A. Yes.

Q. And as an elemental part of the composition, was tar or some inflammable substance like tar a part of it? A. I just couldn't say as to that.

Q. I understand you to state that you had a supply of oil. By that I mean oil used for heating purposes. Is that true? A. Yes.

Q. And where was that situated?

(Testimony of Edward Herzinger.)

A. In the front part of the bar room, on the outside.

Q. What was that oil used for?

A. It was used for heating the bar room.

Q. How was the heat supplied?

A. Through fuel oil stove.

Q. What kind of a stove was that, if you remember?

A. A two-burner fuel oil stove. I just couldn't say what make. [365]

Q. Well, was there a pilot light kept burning in order to help create the heat or help start the fire under the oil?

A. No, it had no pilot light.

Q. How did you start the stove?

A. By turning the oil on and opening the door in the bottom and reaching with a match.

Q. It started with a match? A. Yes.

Q. Was that used for heating water.

A. No.

Q. What was it used for?

A. Just to heat the bar in cold weather.

Q. I understand that you served lunches at your place?

A. Occasionally they would fix them, a hamburger maybe, hot dog and cup of coffee.

Q. How did you keep the hot dogs hot?

A. Never kept them hot, only when they demanded them.

Q. Did you serve hot coffee or hot soup or hot dogs? A. Coffee.

(Testimony of Edward Herzinger.)

Q. How did you heat the coffee?

A. Heated on the butane stove.

Q. And where was the butane stove situated?

A. Close to the rear end of the building, behind the lunch counter.

Q. In what room? [366]

A. In the bar room.

Q. Can you point out about where in the bar room it was situated?

A. About that place there against the wall.

Q. Now just a minute, Mr. Herzinger. This mark here, "X," which on the blackboard would be the eastern end of the bar room, does that mark "X" indicate a door?

A. I don't remember now just what that "X" was put on there for.

Q. Can you point out on the blackboard where any doors or windows were in the bar room?

A. There was two windows on the west side, those on each side of the door, then two windows on the east side, placed almost the same place, a short distance on either side of the bar room.

Q. Did you have a butane tank flowing butane to the butane stove about which you have testified?

A. I don't know if you call it a tank or ball. It was a ball that held butane.

Q. How was that butane ignited?

A. On the stove.

Q. Well, how did you light the stove?

A. Well, the butane stove had a small pilot

(Testimony of Edward Herzinger.)

light. Sometimes it was lit and sometimes it would go out.

Q. Well, do you know, of your own knowledge, Mr. Herzinger, [367] that a pilot light, in order to burn, or any light in order to burn, has to have air?

A. I would think it does.

Q. And can you describe to the Court and jury about where that pilot light was situated relative to the stove?

A. There was a grill right through the center of the stove, possibly 18 inches wide and two feet long. This pilot light was directly under that grill, possibly one inch below the grill, could have been an inch and a half.

Q. Can you tell us how many motors you had in and about your building at or about the time of the fire? By motors, I mean electric motors.

A. Taking each building separate?

Q. Pardon?

A. You mean as a whole or each building separate?

Q. Yes, as a whole, and then if you will, tell the Court and jury where they were located.

A. There was one small motor for the refrigerator in the bar room.

Q. What refrigerator do you mean?

A. The electric refrigerator, approximately 25 feet.

Q. And in what room was that?

A. In the bar room.

Q. And where was there another one?

(Testimony of Edward Herzinger.)

A. One was in the music machine, one was in the picture machine. [368]

Q. Were there any more?

A. Not in the bar room.

Q. Were there any other motors in any other building outside of the bar room?

A. There was one motor in the basement.

Q. To what was that motor connected?

A. To that large beer box that was underneath the beer bar.

Q. Do you recall any other motor in or about the building?

A. In the pump house, about six feet below the surface of the ground, by the water pump.

Q. Any other one?

A. I can't recall any more motors in the buildings.

Q. Mr. Herzinger, I want to call your attention to dealer agreement which was offered in evidence here by your counsel. I think it is Plaintiff's Exhibit 10. This agreement, you will recall, was entered into on the 3rd day of June, 1941, by and between the Standard Oil Company of California, a corporation, and O. J. McVey, and then, as I understand your testimony, this dealer's agreement was later assigned to you through, I think, the Browns, is that correct?

A. Yes, I bought it from the Browns.

Q. So at the time of the fire you were operating under this agreement of June 3, 1941, is that true?

(Testimony of Edward Herzinger.)

A. As near as I know. I didn't sign any other agreement.

Q. You don't know of any other agreement? [369] A. No, I don't.

Q. I want to call your attention, Mr. Herzinger to one or two paragraphs in this agreement, and I am reading from a copy and if the clerk will kindly hand me the original, which I hand you, and I wish you would refer to paragraph 9, which I desire to read to the Court and jury:

> "9. Dealer agrees to protect, defend, and hold harmless the Company against all claims for damage to property, or injury or death to persons, directly or indirectly resulting from any acts or omissions of Dealer or Dealer's employees in or about the said premises, either in the maintenance or operation of the tanks, containers, pipes, pumps and other facilities thereon, or in the vending therefrom of the products and goods handled by Dealer hereunder"

In that paragraph where the "Company" is used, you understand it to mean the Standard Oil Company of California.

Mr. Wilson: Your Honor, I am going to object to this line of questioning on the ground the agreement speaks for itself and that is a question of law to be decided by the Court; calling for conclusions here of the witness based on a legal question.

The Court: I think the objection is good. [370]

Mr. Platt: Your Honor please, what I am at-

(Testimony of Edward Herzinger.)

tempting to show, if I may, notwithstanding this agreement, the defendant, Standard Oil Company of California, has been made a party defendant.

The Court: That is apparent without any testimony from this witness. Objection will be sustained.

Q. I want to call your attention, Mr. Herzinger, to paragraph 11 of this agreement:

> "11. Dealer agrees to conduct all operations hereunder in strict compliance with all the laws, ordinances and regulations of governmental authorities. Dealer further agrees to conduct said operations in a manner best suited for the preservation of Company's property of whatever kind and nature, the furtherance of the sale of Company's products and the promotion of public good will towards the Company. It is understood and agreed that Dealer in the performance of this agreement is engaged in an independent business and nothing herein contained shall be construed as reserving to Company right to control Dealer with respect to his physical conduct in the performance of this agreement. It is further understood and agreed that Company reserves no right to exercise any control over any of Dealer's employees [371] and that all employees of the Dealer shall be entirely under the control and direction of Dealer who shall be responsible for their actions and omissions. Dealer undertakes and agrees that he will, at his own expense, during the term hereof, maintain full insurance under any

(Testimony of Edward Herzinger.)

> Workmen's Compensation Laws effective in said state covering all persons employed by and working for him in connection with the performance of this agreement, and upon request shall furnish Company with satisfactory evidence of the maintenance of such insurance. Dealer accepts exclusive liability for all contributions and payroll taxes required under the Federal Social Security Act and State Unemployment Compensation Laws as to all persons employed by and working for him in connection with the performance of this agreement."

May I ask, Mr. Herzinger, first, if the Standard Oil Company of California ever controlled or attempted to control any of your employees?

Mr. Wilson: I am going to object to that, your Honor, on the ground that goes beyond the scope of the direct examination and even beyond the scope of this case. We have never, in any way, indicated an agency between Standard Oil and Mr. Herzinger and we are not even concerned with that as an element [372] of this case.

The Court: Objection will be sustained.

Q. Mr. Herzinger, you are presently under contractual relations, are you not, with the Standard Oil Company of California?

Mr. Wilson: I presume that is objectionable, I presume it is immaterial.

Mr. Platt: I desire to make the offer, your Honor.

(Jury excused.)

(Argument in absence of the jury.)

(Testimony of Edward Herzinger.)

The Court: The offer will be denied.

Presence of the jury stipulated.

Cross-examination by Mr. Platt resumed.

Q. Mr. Herzinger, do you happen to know what brand of kerosene refrigerator that was that you had in your place? A. No, I don't.

Q. Do you know whether it was what they call a Servel refrigerator?

A. I couldn't say. It could have been.

Q. You do not remember?

A. I do not remember.

Mr. Platt: I think that is all, your Honor.

The Court: Any further examination?

Re-Direct Examination

By Mr. Daly:

Q. You mentioned on cross-examination, I believe, Mr. Herzinger, that this picture machine was in storage in Buhl, Idaho for [373] a while?

A. It was in working order but it——

The Court: (Interrupting) Read the question.

(Question read.)

The Court: What has that to do with this case?

Mr. Daly: It goes to the item of damages, if the Court please.

Q. Mr. Herzinger, going back to the day of the fire, you stated, I believe, that you first heard something about the fire in Wells, is that correct?

A. Yes.

Q. Tell us, if you will just briefly, what you did

(Testimony of Edward Herzinger.)

after you heard some indications there had been a fire there?

A. I went to a telephone and tried to telephone the place to see if there was anything to it.

Q. You said that call didn't go through, I believe. How long were you making that telephone call, if you know?

A. Oh, possibly 15 or 20 minutes.

Q. And then what did you do?

A. Then I went and got in my car and started for the place.

Q. Did you drive straight to Mineral Hot Springs?

A. Yes, I drove straight to Mineral Hot Springs, outside of meeting that man. I had some car trouble on the road and I stopped and asked him if he knew anything about the fire up the line—he was coming from that direction—and he said he did. [374] That was the first I really knew the fire was there.

Q. How long did you spend with him, do you know? A. Just a matter of minutes.

Q. When you got to the Mineral Hot Springs, tell us what you did.

A. I stopped in front of the pumps, approximately 25 feet in front of where that concrete is, and I got out and walked up there to within six feet of the pumps, looking the ruins over.

Q. Did you see the remains of this hose at that time? A. Yes.

(Testimony of Edward Herzinger.)

The Court: Haven't we gone all over this ground?

Mr. Daly: It is preliminary, if the Court please.

The Court: Very well, then.

Q. Did you see the defendant Odermatt at that time? A. Yes, I did.

Q. And I believe you said you had some conversation with him. What was that conversation?

A. I asked Mr. Odermatt if he knew how the fire started and he told me it couldn't have been the gas truck because the delivery was already made. I asked him if the delivery was already made why that hose was still laying on the ground with the nozzle in the filler tank and he said it must have been negligence on Mr. Nielson's part not picking the hose up and putting it on the truck.

Q. Was there anything more said between you at that time? [375]

A. Oh, a few things, I can't just recall just exactly what it was. He wanted to haul up a couple of butane tanks that were off at the side and I stated I thought everything should be left just the way it was until the insurance adjuster comes to look the property over, and later on I noticed these cans were gone.

Q. Mr. Herzinger, you were examining these photographic exhibits which you took and you were asked to state in what respects, if any, the exhibits which were taken the next day were different from the situation on the day of the fire. I hand you Plaintiff's Exhibit No. 24 and ask you if you can

(Testimony of Edward Herzinger.)

tell us any other difference between the items shown in that exhibit between the exhibit and the situation as it was the day of the fire?

A. The only difference I can see here the cap is closed on the filler pipe, which it wasn't the day before when I saw it and there is a tag wired on to that cap.

Q. Is that item you refer to, the tag, the light colored article that appears to hang from a part of the cap on the filler in the center of the picture?

A. Yes.

Q. What was that tag made of, Mr. Herzinger?

A. It appeared to be a paper tag.

Q. Mr. Herzinger, those invoices which were introduced here, representing articles purchased by you from the period between [376] January 4, 1947, and the time of this fire, did they include any purchases from Standard Oil?

A. No, they didn't.

Q. Did you make purchases during that time from Standard Oil Company? A. Yes.

The Court: What exhibit number, if any, did that appear?

Mr. Daly: That was Plaintiff's Exhibit Nos. 12 through 17.

Q. Did you make any other incidental purchases during that same period, Mr. Herzinger?

A. Yes.

Q. Do you know the amount of those purchases?

A. No, not just off-hand.

Mr. Platt: Your Honor please, I assume that

(Testimony of Edward Herzinger.)

these purchases, about which the witness is being interrogated, were made under the dealer's contract in evidence here.

Mr. Daly: Is Mr. Platt referring to this last question? At least what I intended, when I asked the question, were not purchases from Standard Oil.

The Court: This last question does not have any reference to the Standard Oil, Mr. Daly says.

Mr. Platt: Well, I want to understand that, your Honor. [377]

The Court: Will you reframe the question so your purpose is clear?

Mr. Daly: Yes, I will.

Q. Did you make purchases, Mr. Herzinger, in connection with the Mineral Hot Springs, between the period from January 4, 1947, to the date of the fire, other than purchases in the invoices which we have and purchases from the Standard Oil?

A. Yes.

Q. What, generally, were those purchases, Mr. Herzinger?

A. Mostly retail store purchases and combined retail-wholesale store.

Q. For items for sale there? A. Yes.

Q. You were asked, Mr. Herzinger, about the value of the barrel pumps and the question was asked whether or not you had purchased those barrel pumps from Mr. Odermatt for some five dollars and something. When you were describing and placing a value on those barrel pumps, what items were you including in that value?

(Testimony of Edward Herzinger.)

A. I was including both the barrel and contents in the barrel too.

Q. In other words, how many barrel pumps did you have? A. Two pumps.

Q. And how many barrels?

A. Two barrels. [378]

Q. And were the pumps connected with the barrels? A. Yes.

Q. What was in the barrels?

A. Kerosene in one of the barrels and white gas in the other barrel.

Q. What was the purpose of having white gas and kerosene there?

A. For customers that came there from the valley.

Q. Mr. Herzinger, how often did you pay Standard Oil Company for petroleum products delivered there prior to the fire?

A. From the beginning, when I first started there, my best recollection he was paid every time he made the delivery.

Q. Who was paid? A. Odermatt.

Q. The money was paid directly to him for Standard Oil?

A. Yes, either to him or to his truck driver.

Mr. Platt: If your Honor please, I think that question and answer is somewhat confusing. I ask that the question be stricken while I interpose an objection.

The Court: It may be stricken.

Mr. Platt: Evidently there were two methods of

(Testimony of Edward Herzinger.)

delivery to Mr. Herzinger from this testimony. May I inquire?

Q. (By Mr. Platt): Who delivered all the Standard Oil products to you?

Mr. Parry: I think we should object to that as being improper at this time. That is cross-examination. [379]

Mr. Daly: If I may withdraw the question.

The Court: Very well. Do you want to reframe the question?

Mr. Daly: Yes.

Q. (By Mr. Daly): Mr. Herzinger, did you have any credit relationships with Standard Oil Company of California? A. Yes.

Q. What were they? What credit arrangements did you have?

A. I made arrangements whereby I would pay them only once a month and simplify my books in that way.

Mr. Daly: I think that is all. Thank you, Mr. Herzinger.

The Court: Any further cross-examination?

Re-Cross Examination

By Mr. Puccinelli:

Q. This credit relationship that you were talking about just a moment ago, you said you made that relationship so you would simplify your books, is that correct? A. Yes.

Q. Are those the books that you kept at the

(Testimony of Edward Herzinger.)

ranch? A. For the books kept in the place.

Q. Well, what books did you keep in the place?

A. A book we call a day book and book that we call a ledger.

Q. What manner of monthly payment would have simplified your method of keeping books? [380]

Mr. Parry: Objected to as argumentative.

The Court: Objection sustained.

Q. Describe for me the books that you actually kept.

Mr. Parry: We object to that as having been gone over at great length on direct examination.

The Court: Objection sustained.

Q. Just one additional question, Mr. Herzinger. Your testimony today is that when you placed a value of $20 on the barrel pumps, what you actually meant is the barrel pumps and the contents of the barrels and the barrels? A. Yes.

Q. Is that right? A. That's right.

Q. The conversation that you had with Mr. Odermatt, where was that?

A. You mean the one at the ruins of the Springs?

Q. You testified that on the day of the fire, when you got to the Mineral Hot Springs, when you arrived there that you had a conversation with Mr. Odermatt? A. Yes.

Q. Now where was the place that you had the conversation?

A. Right in front of the gas pumps.

Q. Who, if any one else, was present?

A. Nobody that I can recall.

(Testimony of Edward Herzinger.)

Q. I show you one of the pleadings, Mr. Herzinger, which is a [381] part of this case, entitled a Bill of Particulars, and turning to page 2 of the Bill of Particulars, I show you an item entitled "2 Barrel pumps, $45." Is that correct?

A. That is correct the way it is written down there.

Q. However, as written here it is inaccurate, is that correct?

A. It was on the barrels and contents, because they are not listed on there otherwise.

Q. So it should have been two barrel pumps, barrels and contents, $45?

A. I would think that would be proper.

Q. Well, were you claiming $45 for the two barrel pumps, or were you claiming $45 for the barrel pumps, the barrels and the contents?

A. Just $45 for the barrels and the pumps and oil.

Mr. Puccinelli: That's all.

Witness excused.

Mr. Wilson: At this time I would like to call Mr. Odermatt back to the stand for a few questions.

E. J. ODERMATT

having been previously sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. Mr. Odermatt, you testified that you had from the Standard Oil Company a certain manual. You had one manual only at the time you were operating in 1947, is that correct? A. That's right. [382]

Q. I am going to hand you——

A. I wouldn't say that this is the exact manual. This may be a revised edition.

Q. Then I will hand you Plaintiff's Exhibit 26, marked for the purpose of identification, and ask you if that is, to your best knowledge, a general field accounting manual?

A. To the best of my knowledge it is. That is what we are operating on.

Q. And that is the type of the one you were operating under in 1947? A. That's right.

Q. I presume that the Standard Oil Company supplies you with a continuation of open leaf revisions from time to time? A. That is right.

Q. But this manual has always remained in your department at Wells? A. That is true.

Q. After you got a manual?

A. That is right.

Mr. Wilson: I wish to offer Plaintiff's Exhibit 26 in evidence.

Mr. Vargas: If the Court please, as far as the defendant Odermatt, we object on the ground it is

(Testimony of E. J. Odermatt.)

not his manual, it is not binding on him, not prepared or furnished by him, or anything else. [383]

Mr. Wilson: We have subpoened one of these from Mr. Odermatt and he did not have it available, so we obtained it from other persons in the department, and we simply offer this as the manual under which he operates with the Standard Oil Company and as a portion of the evidence defining his relationship to the company.

The Court: Objection will be overruled. It will be admitted in evidence Exhibit 26.

Q. Mr. Odermatt, I believe you testified that your relationship with the Standard Oil Company had continued over 16 to 20 years, or some such overall period?

A. That is right. I have been an employee since 1927.

Q. And in your work were you taught, and did you study, the nature of the dangerous materials which you delivered to various dealers?

A. That's right.

Mr. Platt: We object to that question, if the Court please. I do not see its materiality.

Mr. Wilson: The materiality is that this man is a skilled person in handling these inflammable products in the very nature of his work. I don't know of a person better able to discuss the volatility of fluids and the resulting flames and explosions than a man so trained.

The Court: Is he here as your witness or adverse witness? [384]

(Testimony of E. J. Odermatt.)

Mr. Wilson: Well, I wish to make him such a witness that I may ask him questions regarding explosive material like gasolines and how they should be cared for.

Mr. Platt: Your Honor please, I think it may be conceded and admitted that as a matter of general information gasoline and butane and other gasses like that are volatile and are dangerous. Unless counsel wants to qualify Mr. Odermatt as an expert to bring out something about which we have no knowledge yet, I do not see the materiality of this.

Mr. Wilson: Well, I presume that although all of us knows that certain gasoline fluids are highly inflammable, yet we do not observe or consider whether the gasoline burns or whether it is the fumes that burn or what causes ignition sparks, what are the safety rules, and I am sure Mr. Odermatt's relationships are such that he would know the ordinary and fundamental safety rules for delivery of gas. We wish to go into that.

The Court: You may go ahead. Objection will be overruled.

Mr. Wilson: I will strike that question.

Q. Mr. Odermatt, over the period of time or your relationship with the Standard Oil Company, I presume that you read of safety measures in protecting Standard Oil products, you discussed them with others and you also observed safety measures in handling these products, is that correct? [385]

A. That's right.

(Testimony of E. J. Odermatt.)

Q. And is gasoline one of the most dangerous products sold by Standard Oil Company of California because of its volatility?

A. I don't have that knowledge.

Q. Do you have any knowledge as to how a combustion is formed from gasoline fluids or the escape therefrom in air?

A. You mean in the open air?

Q. Yes.

A. Well, you are getting into a pretty wide field.

The Court: Can you answer that question yes or no? A. I wouldn't know.

Q. Now, Mr. Odermatt, departing from the question of whether or not you know what causes combustion, I presume that you have trained yourself, and have been trained, in the handling of gasolines as sold by the Standard Oil Company?

A. That's right.

Q. And I presume that you instructed Mr. Nielson as to the proper method for him to conduct himself with regard to making tank deliveries to dealers? A. That's true.

Q. Can you give us the instructions which you supplied Mr. Nielson with regard to handling the Standard Oil products, including gasoline?

Mr. Halley: We object to that on the ground it doesn't [386] tend to prove any material issues in this case.

The Court: Objection overruled. Answer the question.

(Testimony of E. J. Odermatt.)

A. You want all the products, or just what pertains to this case?

Q. Let us confine it to the products, let us say, that were on the truck the day of the fire.

A. The dealer deliveries—in most cases the dealer gives us a standing order to keep him supplied within a safe level, so upon arrival at the dealer's premises, you measure each storage tank to ascertain the amount of gasoline that could be safely put into each tank without causing any overflow, and with that knowledge then he would proceed to deliver. I might mention that the trucks are calibrated by weights and measures, the compartments, and each compartment holds a definite amount that is sealed and designated by the State's Weights and Measure. Therefore we know exactly what is in each compartment. With that knowledge and the knowledge of what is in the tank, we proceed to deliver. Do you want to go on from there?

Q. Just describe what you instructed in regard to his conduct while he was delivering.

A. The usual procedure on delivery is to insert the nozzle into the filler pipe.

Q. Perhaps you are really furnishing me what I wish to know, but I wish to know your instructions. [387]

A. I am telling you. Then a new man you have to tell him how to proceed. To insert the nozzle in the filler pipe. On the end of the nozzle, unless the nozzle is of brass construction, we always have a chain, possibly two feet long, that makes ground

(Testimony of E. J. Odermatt.)

connection with the ground before the nozzle is brought to the filler pipe. Then you connect the hose to the compartment that is designated to be pumped into that particular storage tank. Then on our particular trucks all of the nozzles or faucets are spring-charged; in other words, self-closing. Then the compartment is turned on and the driver is to stay within a safe limit of the truck.

Q. Now, Mr. Odermatt, you for many years, according to your testimony, had a sales operating manual put out by the Standard Oil Company sales operating department, issued in 1938, did you not?

A. As an employee, yes.

Q. And as such you were acquainted and could refer to the contents of that manual?

A. We had it yes, as a reference, yes.

Q. And the manual, of course, goes into the elements of the danger of the Standard Oil products delivered?

Mr. Halley: If the Court please, I believe the manual counsel is referring to was previously offered and on objection the objection was sustained. He is now, I believe, referring to the contents of that manual. [388]

Mr. Wilson: It was objected to but the question at that time was not what Mr. Odermatt knew from the manual to guide him in the disposition of various products, but it was whether or not he was controlled by the manual at Wells in his operation. Now I am using the manual to question him in regard to its products.

(Testimony of E. J. Odermatt.)

The Court: You might do that without referring to it.

Q. Do you recall the contents of the manual?

A. No, I don't. Generally, but as far as the manual is concerned, you have to refresh yourself on it.

Q. Now as a result of your experience, you are acquainted with what will cause a gasoline fire or gasoline explosion, are you not?

A. That's right.

Q. And it is true, according to the Standard Oil experience and your own experiences, that fumes, coming in connection with hot substances, such as an exhaust pipe, can cause fire or explosion?

Mr. Vargas: We object to the term explosion. There is no evidence there was any explosion involving gasoline. As a matter of fact, the witnesses have testified that they heard no noise.

Mr. Wilson: Of course, that is a rather fine point. I think Mr. Vargas wasn't here during the first morning, at which time there was reference made by Mr. Moseley of [389] explosions.

The Court: Objection is overruled. Answer the question.

(Question read.)

Mr. Platt: Your Honor, on behalf of Standard Oil Company, I object to the witness assuming to testify on the Standard Oil's experience.

The Court: I think the question is rather leading——

(Testimony of E. J. Odermatt.)

Mr. Wilson: I am asking for expert testimony here from a man engaged in that business. I have to direct my question toward these possibilities, your Honor, as resulting from the type of case we have.

The Court: Well, proceed.

Mr. Halley: Your Honor, I would like to interpose another objection on another ground. It is assuming something not in evidence here, the question is.

The Court: Objection overruled. Answer the question. Reframe your question.

Q. Mr. Odermatt, from your experiences, as in the handling of Standard Oil gasolines and inflammable products of Standard Oil Company, can you say whether or not a fire or an explosion may result from contact of fumes from Standard Oil gasoline on a hot metal substance, such as a hot exhause pipe?

A. To my knowledge I have never heard of or witnessed such a fire. [390]

Q. You have never observed such a fire?

A. No.

Q. In your experience and training have you ever heard of such a fire resulting?

A. I answered you that I hadn't.

Q. You never heard of such a fire?

A. That is what I told you.

Q. Mr. Odermatt, when you first heard of this fire, what did you do with regard to notifying any persons, other than some one at your own plant?

A. The first thing I did I drove to Contact to see just exactly what had happened. After exam-

(Testimony of E. J. Odermatt.)

ining this, I reported the fire to my insurance people and to Mr. Warner at Ely.

Q. You notified Mr. Warner at Ely when you returned to Wells? A. That is correct.

Q. Who is Mr. Warner?

A. Branch manager of Standard Oil Company.

Q. What did you do, if anything, with the gasoline that had been delivered that day by Mr. Nielson into the storage tanks at Mr. Herzinger's place of business? A. Just what do you mean?

Q. After the fire?

A. Do you want me to tell exactly what happened?

Q. What did you do, yes, in regard to those products after the fire? [391]

A. Well, at the time of the fire, when I got there, I asked for Mr. Herzinger. They told me he was in Elko, so I waited there until Mr. Herzinger returned, which was about dusk, and at the time he stopped there were several people talking to me. All I did was speak to him and say a word and told him I would talk to him a little bit later on when the people got away, so down in this little wooden building, which was a bar, in the presence of Mr. Nielson, I was talking to Mr. Herzinger.

Q. I was inquiring about what you did with the product.

A. I am coming to that.

Q. That is what I am interested in.

A. And at that time I told Mr. Herzinger——

Q. I just simply wish——

(Testimony of E. J. Odermatt.)

The Court: Can you answer this question?

(Question read.)

A. That is what I am leading to.

The Court: You don't have to lead up.

Q. What did you do with it? A. Nothing.

Q. What did you do the next day after the fire?

A. I was trying to tell you all this and I was stopped.

Q. Just tell us what you did with the products in the storage tank.

A. There was nothing done with the products for several days.

Q. Then what did you do? [392]

A. At the end of several days we went down there with another pumping equipment and pumped the tanks out.

Q. Who did that?

A. I pumped the tanks out in Mr. Moseley's presence.

Q. What did you do with the gasoline?

A. We returned to the company the amount that was delivered that day. As——

Q. That is all I want to know.

The Court: Any cross-examination?

Cross-Examination

By Mr. Platt:

Q. Mr. Odermatt, did you yourself participate in pumping out the gas from the tanks, the gasoline?

A. Yes, sir.

Q. You took part in it? A. Yes, sir.

(Testimony of E. J. Odermatt.)

Q. Can you tell us how much gasoline there was in the so-called first tank that was filled?

A. Well, there was approximately, I would say, 400 gallons in the first storage tank.

Q. Can you tell us how near the top that gasoline was, the top of the tank, before you pumped it out?

A. Between five and seven inches from the top of the storage tank.

Q. From the top? [393]

A. Not from the top of the ground, but from the top of the tank.

Q. In other words, the surface of the gas in that tank was from 5 to 7 inches below the top of the tank? A. That's correct.

Q. Now did you notice anything about how much gasoline there was in the second tank?

A. There was the same amount approximately. I might tell you this that might help, that in the two storage tanks we pumped out 700 gallons for return which had been delivered on that day. Then Mr. Moseley asked me if I could put the remaining part in the barrels because it was not flowing to them in the storage tanks, so I got some barrels in back of the other buildings and there were two full barrels and approximately half of a third barrel. We moved from the two storage tanks about 830 or 840 gallons of gasoline.

Q. Do you recall, Mr. Odermatt, how near the surface the gasoline in the second tank was to the top of the tank?

(Testimony of E. J. Odermatt.)

A. Well, it was several inches underneath the shell of the storage tank.

Q. Can you state approximately how many inches?

A. I would say approximately the same as the first tank, from five to seven inches.

Q. Where, if you know, were the faucets on the truck that delivered the gas? [394]

A. They were on the right-hand side of the truck.

Q. On the right-hand side? A. Yes.

Q. That is the right-hand side going toward the front of the truck?

A. The right-hand side facing in the same direction that the truck travels.

Q. And was that faucet midway between, or how close between from the back?

A. There were five faucets on the truck. There were four different tanks and five different compartments on that particular truck. Each compartment had its own faucet.

Q. And each one of these faucets was on the right-hand side of the truck?

A. That is correct.

Q. Looking toward the front of the truck?

A. That is correct.

Mr. Platt: That is all.

Mr. Wilson: Your Honor, this is the conclusion of the plaintiff's case, with this one point, that we are going to ask at this time, as soon as Mr. Daly prepares the pleading, to amend our complaint with regard to one item.

Mr. Daly: It is an amendment, if the Court please, to conform with the proof and it is in the amount of the value of the buildings. The allegation is on page 4, the top of the [395] page, $10,388.35, and the testimony of Mr. Knapp, the contractor, was $12,540, according to Mr. Knapp, and that figure should also be changed in the prayer of the complaint, if the Court please, paragraph 6.

The Court: There is no objection to the amendment as to the allegation of the value of the premises just immediately before the fire and the pleading will be amended; the complaint now before the Court will be amended to strike from it all matters having to do with loss of profits and in the prayer for recovery for loss of profits.

Mr. Wilson: That is plaintiff's case.

Mr. Platt: Your Honor please, on behalf of defendant Standard Oil Company of California, I desire to make a motion.

Motion for directed verdict argued in absence of the jury.

Tuesday, February 14, 1950

The Court: The motion is denied. We will be in recess until tomorrow morning at 10:00 o'clock.

Wednesday, February 15, 1950, 10:00 A.M.

Presence of the jury stipulated.

LEE JAMES NIELSON

a witness on behalf of the defendants, being duly sworn, testified as follows: [396]

Direct Examination

By Mr. Halley:

Q. Will you state your name please?
A. Lee James Nielson.
Q. Where do you live, Mr. Nielson?
A. Wells, Nevada.
Q. How long have you lived at that place?
A. All my life, 27 years.
Q. You were born in that vicinity, were you?
A. I was born in Elko.
Q. And Wells is in Elko County?
A. Wells is in Elko County.
Q. During the year 1946 and part of the year 1947 were you employed by Mr. Odermatt, one of the defendants in this case? A. Yes, I was.
Q. When did you first go to work for Mr. Odermatt?
A. Immediately after I got out of the army, in 1941, about March 26th.
Q. And you say when you were discharged from the service? A. Yes.

(Testimony of Lee James Nielson.)

Q. How long had you been in the service?

A. Approximately three years.

Q. In what capacity were you engaged by Mr. Odermatt? A. As truck driver.

Q. Would that be a tank truck?

A. Tank truck. [397]

Q. Did Mr. Odermatt own any tank trucks other than this one truck?

A. At that time he owned just the one truck.

Q. During the period that you worked for him, did he have just one truck?

A. No, about 16 months after that he purchased another tank truck.

Q. Will you please describe the tank truck that you were engaged to drive?

A. A 1942 Ford, six cylinder. It was a flat rack with a couple of compartments. The compartments could be taken off.

Q. How many compartments?

A. There were five compartments on the four tanks.

Q. One tank had two compartments?

A. One tank had two compartments.

Q. And they were attached to the truck by what means? A. Bolts underneath.

Q. What was the capacity of the respective tanks from the cab on back to the end of the truck?

A. The first tank or compartment had 200 gallons and 100 gallons, the next had 300 gallons, and the following two were 200 gallon tanks.

(Testimony of Lee James Nielson.)

Q. What was the construction of the tanks? Can you describe the tanks?

A. I am not sure just what you mean by that.

Q. Well, what were their shape and what equipment did they have on them in the way of facilities for filling tanks?

A. Well, the tanks were about five feet wide and that 300-gallon tank was approximately 3½ to 4 feet long and the two 100-gallon tanks were maybe 2½ feet.

Q. What facilities did they have on them for filling? Where was that facility?

A. In the top there was a round cap, dome cap, that you locked or lifted it in order to fill the tanks. In order to drain the tank, there was a spout at the bottom of each tank that you had to use. There was a spring style lock on it that you had to use a wrench in order to turn the tanks on.

Q. What was the construction of the flat rack truck? Was it wood or steel? A. It was wood.

Q. Had a wooden body?

A. A wooden body, yes.

Q. The valve for moving the tanks you said had to be operated by a wrench?

A. Yes, a spring type valve.

Q. Would you describe that valve?

A. Well, a little square—I don't know what you call it—you had to stick this wrench in and pry down in order to let the gasoline flow freely, then it would lock right over and you could push it back up and the gasoline would turn off. [399]

(Testimony of Lee James Nielson.)

Q. Did you attach a hose to that particular connection when you were unloading gas?

A. Yes, sir.

Q. How was the hose attached, by what facility?

A. Well, the hose has a bronze end and you had to twist the hose quite firmly so you wouldn't lose any gas and use the wrench that you had to pry and press down hard in order to tighten it so the gas would flow.

Q. In other words, in affixing the hose to this valve you just mentioned you use a wrench?

A. That's right.

Q. Was the connection under the hose and also on the tank made of brass?

A. I think they were.

Q. After you had completed your delivery, how would go remove the hose from the tank?

A. Well, you had to use this wrench again in order—first, to turn the spring type faucet, then use another wrench to undo this brass type coupling.

Q. In other words, you had to use wrenches to put it on and to take it off?

A. To undo it and take it off.

Q. I think you explained that by saying so you wouldn't lose any gas? A. That's right. [400]

Q. Now as of May 3, 1947, how long had you been driving this particular truck?

A. About 12 months—about 14 months, excuse me.

Q. And was that in the immediate vicinity of Wells?

(Testimony of Lee James Nielson.)

A. Yes, that was in that vicinity.

Q. During all of that period you had delivered gasoline to Mr. Herzinger's place near Contact?

A. I do not quite recall during all that period. I did not make every trip, no. I made some of the trips to that place.

Q. Now the connection on the tank for delivering the gas, was on what side of the truck?

A. Facing the rear of the truck. It would be on the right-hand side.

Q. Towards the truck? A. That's right.

Q. The opposite side from the driver's seat?

A. The opposite side of the driver's side.

Q. On the 3rd day of May, 1947, did you have occasion to go to Mr. Herzinger's place?

A. I did.

Q. That is known as what?

A. Mineral Springs.

Q. And for what purpose did you go there on that day?

A. To deliver gasoline to Mr. Herzinger.

Q. From what point had you left, from Wells?

A. Yes.

Q. That is where Mr. Odermatt has his place of business? A. Yes.

Q. When you left Wells how much gasoline did you have on your truck?

A. A thousand gallons.

Q. You had all the compartments filled?

A. Yes.

(Testimony of Lee James Nielson.)

Q. Do you recall what time of the day you left Wells to go to Mineral Hot Springs that day?

A. Not exactly. It was approximately eleven o'clock.

Q. Where were you going to deliver gasoline that you had on the truck, this thousand gallons?

A. To Mr. Herzinger, Ray King's, the State Highway.

Q. The State Highway Department?

A. The State Highway Department.

Q. That is one of their division plants out there?

A. That's right.

Q. Where is that from Ray King's?

A. Directly across the highway from Ray King's place.

Q. That is how far from Mr. Herzinger's?

A. About a mile and a half.

Q. You had gasoline for Mr. Herzinger and the Highway Department, is that right?

A. Yes. [402]

Q. After leaving Wells where did you go direct?

A. Direct to Ray King's place—excuse me, Mr. Herzinger's place.

Q. That was the first stop you made for delivery of gasoline? A. Yes, sir.

Q. When did you arrive there on that day?

A. It was a little after 12 o'clock, but I couldn't say just what time it was.

Q. It was shortly after noon of that day?

A. Shortly after noon.

(Testimony of Lee James Nielson.)

Q. When you arrived at Mr. Herzinger's place, where did you stop the truck first?

A. I stopped inside—it would be under the canopy next to the door.

Q. Would you please step to the board—by the way, are you familiar with this diagram? For your information that diagram was drawn by Mr. Moseley. Can you orient yourself? Is that a reasonable replica of the shape and buildings and respective positions? A. Yes.

Q. There is a 16x16, so labelled, canopy. You say you drove under the canopy. Is that what you had reference to? A. Yes, under the canopy.

Q. From what direction were you coming?

A. Well, coming from the south, headed north.

Q. From the south to here, north?

A. Headed north.

Q. Which way did you drive your truck under the canopy?

A. Well, this is the highway, drove it in this direction.

Q. You drove in from the south?

A. That's right.

Q. And first entered the south end of the canopy, is that right? A. Yes.

Q. Where is the filler pipe on the inside tank, as you remember?

A. As you went to the grocery store door, it is to your right, approximately two feet from the door.

Q. To the right as you entered the door?

(Testimony of Lee James Nielson.)

A. That's right.

Q. In other words, to the south of the door?

A. To the south of the door.

Q. Will you make a mark where you recall the filler pipe was?

A. Well, I would say approximately right here.

Q. How close to the door is that?

A. Approximately two feet from the door.

Q. Two feet south of the door?

A. Two feet south of the door.

Q. Is the opening elevated from the ground?

A. The filler pipe itself? [404]

Q. Yes.

A. No, the filler pipe comes just about an inch above the ground.

Q. Where is the vent for that tank, if you know?

A. It is inside the cap and it is a pipe within a pipe.

Q. In other words, the filler pipe and the vent are more or less together, is that right?

A. That's right.

Q. Can you draw a diagram of that pipe?

A. This is a steel wire, this is the air vent, this is where your gasoline goes.

Q. The "x" you have marked, that is the actual filler pipe?

A. That is the filler pipe for gasoline.

Q. And the outside rim is——

A. The air vent.

Q. That is the vent? A. Yes.

Q. I wonder if you could draw another diagram

(Testimony of Lee James Nielson.)

showing how the filler pipe and the vent enters the tank? You say it is a pipe within a pipe?

A. From the pipe straight down. I don't know where the tank is, because I have never seen the tank.

Q. You have one pipe here. Is there another pipe?

A. Yes, there is another pipe here like this, that goes down. This is your air vent. This is where you fill. [405]

Q. In other words, gasoline fills in here and the vent comes up the other side, is that true?

A. Right in here.

Q. And the vent is likewise about an inch above the ground, is that true?

A. About an inch above the ground.

Q. Would you mark the position of your truck when you were at the first tank, the approximate position of your truck? Mark that "NT."

A. Well, I drove up in this direction and I came approximately in here. That is as far as I could get. It could have been a little bit farther, but that is approximately where it is.

Q. You say that is as far as you could get it in? What do you mean by that?

A. There was another car parked in through here and I didn't want to get too close to that.

Q. On the north side?

A. On the north side, a fellow was in under the canopy.

(Testimony of Lee James Nielson.)

Q. In other words, that blocked you from going clear through? A. That's right.

Q. Just mark that truck "NT." What did you do after you drove your truck in there?

A. I got out on this side of the truck, the driver's side.

Q. The left side?

A. Left side, and walked around, and I walked around and you [406] can see in through the door, walking through here, and I proceeded on to the truck in order to take off the gasoline.

Q. Did you shut that truck off before you got out? A. Yes, sir, I did.

Q. Is there a measuring stick there?

A. It usually lies on two barrels and was right in here.

Q. That would be in front of the north side of the bar?

A. The north side of the bar and south side of the grocery store.

Q. Did you do anything with that measuring stick? A. I measured both tanks.

Q. And you had done that before on other occasions?

A. Every occasion we measure the tanks.

Q. You were familiar with the calibration on the stick, were you? A. That's right.

Q. After you measured those tanks, just what did you do?

A. I found out I could leave 700 gallons safely

(Testimony of Lee James Nielson.)

in the two tanks, so I proceeded to hook up the tanks.

Q. You hooked up one tank to the inside underground tank?

A. Yes, the tank here. The first 200-gallon tank, this is right here.

Q. And did that take all of the 200 gallons?

A. Yes. It took that and it had room left.

Q. Did you put any more gasoline from your truck into the [407] inside underground tank?

A. Yes, on measuring this tank I found this tank would hold better than 300 gallons and so after I finished filling this tank, I proceeded with the 300-gallon tank in order to drain a little bit out of that into this one.

Q. About how much of that tank did you drain into that tank?

A. Approximately—I had no way of counting—approximately 20 to 30 gallons.

Q. After you did that, what did you then do?

A. After I drained in here?

Q. Yes.

A. I turned the hose off, disconnected the hose, and held the hose to drain the gasoline out of the hose, so I could hook the hose on the side.

Q. What did you do with the hose after you drained it?

A. I put it on the side of the truck, put it right in here, right on the side of the truck there.

Q. Then what did you do?

A. I got in the truck and backed out.

(Testimony of Lee James Nielson.)

Q. Why did you back out?

A. Because I couldn't proceed through the canopy because it was blocked by this other car.

Q. By the way, what kind of car was it on the north side of the canopy?

A. Thirty or '31 Model A. [408]

Q. Ford? A. Ford.

Q. You backed up toward the south, is that right?

A. Backed to the south and drove it this way. Of course, that is very unusual, backing up.

Q. What do you mean?

A. You have very poor vision on this side of the truck. You usually go around and drive in.

Q. That is what you normally do?

A. That is the normal procedure.

Q. But your progress was blocked?

A. My progress was blocked.

Q. You backed your truck to the south and then proceeded north again to the outside of the canopy? A. The outside of the canopy.

Q. Was your truck parallel to the canopy then, and the pumps? A. Yes.

Q. For your information, Mr. Nielson, the two round circles I am pointing to have been designated as gasoline pumps. Were there two pumps there?

A. There were two pumps there.

Q. There was an underground tank beyond the canopy to the west, is that true? [409]

A. Yes.

Q. What was the construction of that filler pipe?

(Testimony of Lee James Nielson.)

A. It came out about 14 inches above the cement block.

Q. It was 14 inches above the foundation?

A. Yes, the island.

Q. And about how far above the ground itself, the ground level, was the opening to the filler pipe?

A. Oh, it was two or three inches. The island is two or three inches high, maybe four inches high.

Q. And that was about 14 inches above?

A. About 14 inches above.

Q. Do you know where the vent for that particular tank was?

A. It was up close here—I am not positive of the exact location, but it did go right up under the canopy.

Q. Now I show you defendant's Exhibit O-A, which has been identified as a photograph of these improvements here prior to the fire, and ask you to look at that and see if you can find the vent pipe in the photograph. If you find it, point it out to the jury, if you would please.

A. I think this right here, shows center post —there is a little pipe and right on the side of it.

Q. Would you mark that in ink? (Witness complies.) I might ask, while the jury is looking at the picture, does that vent terminate under the canopy, do you recall?

A. It is under the canopy, yes, sir. [410]

Q. It didn't go through it?

A. No, it didn't go through.

Q. Likewise while the jury is looking at the

(Testimony of Lee James Nielson.)

picture, will you draw on the board a diagram——

The Court: I think you should wait until the exhibit is examined by the jury so you will have the attention of all the jurors.

Q. Mr. Nielson, prior to moving your truck from under the canopy, did you go into the grocery store here?

Mr. Parry: I wonder if counsel would refrain from asking leading questions on these material points?

Q. Did you go into the grocery store?

Mr. Parry: Again I object. That is a leading question.

The Court: Objection overruled. Answer the question.

A. I am not quite clear at the time whether I had started my second delivery.

Q. After you completed your delivery to the inside tank, did you do anything before putting your truck in reverse and going out to the other side of the canopy?

A. Yes, I did; disconnected my hose and drained the hose.

Q. After that did you do anything?

A. I got in my truck and backed out.

Q. And went out to the outside. After you got to the outside of the canopy, what did you do? [411]

A. After I arrived on the outside, I turned the motor off and got out of my truck, walking to the rear, took the hose off the truck first by inserting

(Testimony of Lee James Nielson.)

the nozzle into the filler pipe and then hooking up this fitting with the truck. Drained it.

Q. Hooking up the fitting on the hose to the tank on the truck did you use any wrenches that you described?

A. Yes, used the regular wrench.

Q. You hooked it first to what tank on the truck?

A. On the outside. I hooked it to the second tank, the 300-gallon tank that I had already taken some gas out of.

Q. I believe you said you used the measuring stick to determine the amount of gasoline that you could safely pump into the outside tank, is that right? A. Yes.

Q. How much gasoline did you determine you could put into that tank at that time?

A. That tank was empty at the time. It wouldn't pump. They told me it wouldn't pump.

Q. You had been informed it wouldn't pump?

A. I had been informed by one of them it wouldn't pump?

Q. By somebody in the place? A. Yes.

Q. And you measured it too? [412]

A. That's right, I measured it too.

Q. How much gas would it take? Do you know the capacity of that tank?

A. The outside tank is 520 gallons.

Q. Right after you connected your hose to this 300-gallon tank, what did you then do?

A. I continued to fill the tank with gas.

Q. From that particular tank?

(Testimony of Lee James Nielson.)

A. From the second 300-gallon tank.

Q. Did you empty that tank? A. Yes.

Q. Into the outside tank?

A. Into the outside tank.

Q. How long did that take, if you know?

A. It took approximately between 10 and 15 minutes to drain.

Q. Was there any overflowing or spilling at that particular point?

A. No, no overflowing or spilling.

Q. After you had drained that tank from your truck, what did you then do?

A. I hooked up the next to the last 200-gallon tank.

Q. That is next to the last in the rear?

A. That is in the rear, yes.

Q. The 200-gallon tank?

A. 200 gallons. [413]

Q. And describe the manner in which you hooked that up.

A. Well, first I turned off the lines and disconnected the hose and went through the same procedure and was sure it was right and then opened the faucet of the second tank.

Q. Did you use the wrench again?

A. Used the wrench again.

Q. And then you turned on the faucet?

A. Yes, I turned on the faucet.

Q. What is the capacity of that tank?

A. 520 gallons.

(Testimony of Lee James Nielson.)

Q. The tank on your truck that you were draining? A. 200 gallons.

Q. And that is second to the rear?

A. Next to the rear.

Q. What did you do after you turned on the faucet? A. On the last tank?

Q. Yes. A. I waited for it to drain.

Q. How long did that take to drain?

A. Oh, 8 to 10 minutes approximately.

Q. Did you notice whether there was any spilling or leaking of gasoline?

A. No, sir, there was no spilling or leaking of gasoline.

After that tank drained, what did you then do?

A. Disconnected the hose, turned it off and disconnected the [414] hose.

Q. How did you disconnect it?

A. I had to use a wrench again to disconnect the hose.

Q. After you disconnected the hose, what did you then do?

A. Held the hose high to be sure there was no gas, in order to drain the tank for safety before proceeding to make up the invoice.

Q. After you drained the hose, what did you do?

A. I laid the hose down alongside the cement island.

Q. After you did that, what did you do?

A. I proceeded inside to make up the invoice for the fill.

(Testimony of Lee James Nielson.)

Q. By that invoice for the fill, do you mean the charge to Mr. Herzinger?

A. Charge to Mr. Herzinger.

Q. He had a charge account with the Standard Oil, did he? A. Yes.

Q. What is the height, Mr. Nielson, of the fixture on the tanks to which you affix the hose from the ground?

A. Approximately 3½ to 4 feet high. That is the fixture of the tank.

Q. Above the ground?

A. Above the ground, that's right.

Q. Is that about the height of the flat rack from the ground? A. That's right.

Q. When you went inside, did you see anybody in there? [415] A. Yes, I did.

Q. Who did you see?

A. Mr. Moseley was behind the bar. Mr. Klitz was sitting at the end of the bar.

Q. What end?

A. That would be the east end of the bar.

Q. Down here?

A. Not the lunch counter, the bar itself.

Q. The bar here? A. Yes.

Q. Was anybody else in there that you noticed?

A. Mr. Bill Hack was sitting at the door.

Q. The door of what? A. Of the bar.

Q. On what side was he sitting?

A. North side of the door.

Q. Between the door of the bar and the grocery store door? A. That's right.

(Testimony of Lee James Nielson.)

Q. Do you know Mr. Hack? A. Yes, I do.

Q. Where does he live?

A. I don't know for sure where he lives. I know he is there most of the time.

Q. Had you seen him at this particular place before? A. Many times. [416]

Q. Did you ever see Mr. Klitz there before?

A. Several times.

Q. And have you ever seen Mr. Moseley there before? A. Yes, I have seen Mr. Moseley.

Q. Was there anybody else in the bar part of the premises at that time?

A. No, just the four of us.

Q. Did you notice what any of the four people were doing?

A. No. Mr. Bill Hack was seated by the door when I walked in and Mr. Moseley was behind the bar and Mr. Klitz was sitting in the bar.

Q. After you came into the bar, what did you first do?

A. The first thing I did was to take a drink of Pepsi Cola I had bought and then went to the rear of the building and put a nickel in this juke box.

Q. When did you buy this Pepsi Cola?

A. While I was draining the second tank on the outside. After I moved the truck at the outside tank, that is when I first purchased the Pepsi Cola.

Q. Who did you purchase it from?

A. Mr. Moseley.

Q. You went inside the premises to purchase it, did you?

(Testimony of Lee James Nielson.)

A. Yes, the bar came right up next to the west wall and I stepped inside the door and purchased this drink.

Q. While the first tank was draining on the outside? [417]

A. On the outside tank, the remains of the 300-gallon tank.

Q. While you were in the process of purchasing this Pepsi Cola did you see your truck?

A. Yes, you could see the truck. You could see the whole front end from that bar.

Q. There are doors and windows there?

A. Doors and windows.

Q. Did you drink part of the Pepsi Cola at that time? A. When I first purchased it?

Q. Yes.

A. I may have taken a swallow or two.

Q. Then you say you came in to finish it when you came in to make your invoice out, is that right?

A. That's right.

Q. Where did you place your invoice book?

A. It was on the end of the bar by my Pepsi Cola.

Q. And that is the west end of the bar?

A. The west end of the bar.

Q. Where was Mr. Moseley in relation to you?

A. He was still behind the bar.

Q. What part? A. About the center.

Q. Are there any stools in the bar there?

A. There were.

Q. Did you sit on a stool? [418]

(Testimony of Lee James Nielson.)

A. No, sir, I didn't.

Q. Did you have any conversation with Mr. Moseley?

A. Very little conversation with Mr. Moseley.

Q. What was your conversation at that time?

A. I don't rightly recall. I took a drink of Pepsi Cola and walked up and put a nickel in the panorama machine and walked back to the bar.

Q. You walked back to the bar to the place where your Pepsi Cola was? A. That's right.

Q. Did you fill out your invoice?

A. No, I didn't.

Q. Why didn't you fill out your invoice?

A. I put a nickel in the panorama machine and returned then to the bar and this machine started flickering.

Q. The panorama machine started flickering?

A. That's right.

Q. You noticed that, did you? A. Yes.

Q. Where was Mr. Klitz at that time?

A. Mr. Klitz was still sitting at the bar at that time.

Q. Did you notice whether he did anything with relation to the machine?

A. He asked Mr. Moseley if he knew how to fix it and Mr. Moseley said he didn't and he proceeded to go to the machine. [419]

Q. Did you see him look into the machine?

A. I saw him look into the machine.

Q. Had you filled out your invoice then?

A. No, I was watching the machine and took

(Testimony of Lee James Nielson.)

a couple of steps out from the bar to watch it at that time.

Q. To view the machine?

A. To view the machine.

Q. Did Mr. Hack join in any of this conversation?

A. That I don't remember. I don't know whether he did or not.

Q. Did you hear Mr. Hack say anything at that time?

A. Just about that time he hollered, "Hey" and I turned around and noticed the flash of fire next to the window outside.

Q. You noticed the flash of fire next to what window?

A. It would be the right-hand side of the bar looking out on the north end of the bar, looking out the door.

Q. Would you please come to the board here and point out where you first observed this flash of fire?

A. I was next to the bar in here approximately —a big window here, and I seen the flash of fire in here. Mr. Hack hollered, "Hey," and I turned around just in time to see the flash of fire come in and go out.

Q. In what direction?

A. It came out in this direction and back. It came from the north-south and then flashed from south back to the north. [420]

Q. From what point relative to the canopy?

(Testimony of Lee James Nielson.)

A. It was in front of the canopy. It was next to the building here.

Q. Close to the wall of the building?

A. Close to the wall of the building.

Q. Close to the west wall of the building, is that right? A. That's right.

Q. After you heard Mr. Hack say "Hey" and you saw that flash of fire flash back from north to south and south to north, what did you do?

A. I laid the drink on the bar, picked up my invoice book and ran outside.

Q. In what direction did you run? You went out this door?

A. Went out that door and was headed directly west.

Q. How far west did you go?

A. I ran out to the rear of the truck and then got in the cab and drove the truck away.

Q. How did you start the truck? Do you have to crank it? A. No, it has a push button.

Q. You started it that way?

A. Started it that way.

Q. When you ran out the door there toward the west and to your truck, did you observe any further fire?

A. I looked over my shoulder to the north and seen there were flames up in the canopy and it was reaching down towards the [421] truck at the end of the canopy.

Q. To the west? A. To the west.

Q. Toward your truck?

(Testimony of Lee James Nielson.)

A. Toward the truck.

Q. And from above? A. From above.

Q. Did you observe whether or not there was any fire on your truck at that time?

A. There was no fire on the truck at that time.

Q. And you say you drove the truck away. Where did you drive to?

A. Approximately 200 yards or so up the highway, going north.

Q. That would be north? A. That's right.

Q. Can you estimate, Mr. Nielson, the time that transpired from the time you left the door here and the time you had your truck in motion?

A. From the time I left the bar and ran out and drove it off?

Q. Yes.

A. I would say 30 seconds at the most.

Q. About half a minute?

A. About half a minute.

Q. After you drove the truck north and stopped it, what did you then do? [422]

A. I got out of the truck and the first thing I noticed was the top around the fills was on fire.

Q. Will you explain that a little fuller?

A. Your fill, as I explained before, is the cap and in order to fill you have to undo this cap and let it back while you fill your truck. After you fill your truck, you let it back right.

Q. Is there a vent in it?

A. There was a vent in it.

Q. The fire was around that fill?

(Testimony of Lee James Nielson.)

A. Around the fill.

Q. Was that around the tank or the compartment?

A. Well, it was on two or three of them.

Q. Of the fills of two or three tanks?

A. That's right.

Q. In relation to the cab of the truck, what were the location of the tanks?

A. They were on the back of it.

Q. Was one tank immediately behind the cab?

A. Immediately behind the cab, yes.

Q. That was on fire? A. That was on fire.

Q. What other tank was on fire?

A. The next two I think were on fire.

Q. What did you do then when you noticed the fire around the [423] fills?

A. I had to get something to fight the fire with.

Q. What did you find?

A. I found I didn't have a shovel or extinguisher, either one.

Q. What did you do?

A. I ran back up around the building and asked Mr. Klitz and the boys where the extinguisher was to put the fire out.

Q. When you say around the building, that was to the east here, you mean?

A. No. They were 150 yards south upon a little hill and I ran from the truck around, right around to the west side of the building and up this hill.

Q. Down the highway? A. Yes.

(Testimony of Lee James Nielson.)

Q. When you refer to "they," who do you mean —"they were on the hill"?

A. Mr. Klitz, Mr. Moseley, Mr. Verdi, Bill Hack.

Q. Is Mr. Verdi connected with the place, do you know? A. Yes, he worked there.

Q. After you ran around and saw them on the hill, you say you asked them for something to fight the fire with? A. Yes, I did.

Q. Then what happened?

A. They informed me that they had dropped a fire extinguisher back of the building somewhere in the brush, they didn't know [424] exactly where it was. It was back of the building some place.

Q. Then what did you do?

A. I ran back around the building.

Q. To the east?

A. To the east and luckily ran into the extinguisher and took it and ran over to my truck.

Q. What kind of extinguisher was this?

A. It was—I don't know what you call it, quite a large one.

Q. Had you had any trouble locating it?

A. I was fortunate to run onto it.

Q. Did you use that on the truck?

A. Yes, I got it on top of the truck and just about had the fire out when the extinguisher went out.

Q. You used what was in the extinguisher?

A. Yes.

Q. Then what did you do?

A. I had nothing else to fight the fire with, so

(Testimony of Lee James Nielson.)

I had to run clear around again to the top of this hill and asked if they had a shovel and that is when Mr. Klitz informed me there was a shovel in the back of his truck parked in back there and I ran back down and got the shovel from his truck.

Q. Where was this truck parked, if you recall?

A. It was parked down pretty close to the light plant, on a little road that led down to that plant.

Q. You got the shovel from the truck? [425]

A. Yes.

Q. Then what did you do?

A. Proceeded back to the truck and started throwing dirt up. I decided I was just throwing dirt in vain so got and shoveled dirt all around the fills.

Q. Were you making any progress in fighting the fire? A. Very little.

Q. Did any party come along about that time?

A. Mr. Zelliox came along.

Q. Who is Mr. Zelliox?

A. He was employed by the U. C. Land and Cattle Company. He was foreman.

Q. That is the Utah Land and Cattle Company?

A. Yes.

Q. Was he in a vehicle of some kind?

A. I don't recall how he got there. I hadn't paid much attention.

Q. You were fighting the fire?

A. I was fighting the fire.

Q. Did Mr. Zelliox do anything then?

A. The first thing I remember Mr. Zilliox doing

(Testimony of Lee James Nielson.)

was handing me a blanket or canvas to try to smother the fire.

Q. What did you do with it?

A. Proceeded throwing the blanket over the flame and trying to smother the fire. [426]

Q. Did you have any success?

A. He got a canvas and helped me and then we got the fire out by throwing the canvas over the fire and smothering it like that.

Q. Prior to the arrival of Mr. Zilliox had you received any burns on your face or hands or any part of your body, when you were fighting the fire?

A. No, I had not.

Q. Did you after that?

A. Touching those faucets I had a couple of small blisters about my hands and my face was warm from the fire that came from under the blanket and the canvas.

Q. That is the first burn you had, from underneath the blanket? A. That's right.

Q. Was your throat burned in any way?

A. My throat felt awfully dry.

Q. After you and Mr. Zilliox were successful in getting the fire out, what did you then do?

A. We had the fire out in a few minutes and there were quite a few cars around up along the highway. They didn't want to come past the truck, so we decided to move the truck on a little sideways.

Q. Did you do that? A. Yes, we did. [427]

Q. Did you see any other people at the scene of the truck other than Mr. Zilliox at that time?

(Testimony of Lee James Nielson.)

A. Not until after we got down and had the truck parked on this little road.

Q. Who did you see?

A. I think Mrs. McLean came along at that time.

Q. And did you go any place with Mrs. McLean?

A. Yes, she took me over to Ray King's.

Q. In her car? A. In her car.

Q. Do you recall having any conversation with Mrs. McLean?

A. The only conversation I recall with Mrs. McLean, she said my face looked like it was burned pretty bad, had smoke on my face, and I was telling her my throat felt awfully funny, but it was such a short distance we didn't have time to say much.

Q. King's was how far from this place?

A. Approximately a mile or a mile and a half.

Q. Do you recall making any statement to Mrs. McLean at that time, "Terrible, terrible, I shouldn't have left the truck; I shouldn't have gone inside"?

A. No, I don't recall making that statement.

Q. After you got to King's, you were treated for your burns, were you? A. Yes. [428]

Q. By whom?

A. Frances King. She is a registered nurse.

Q. While you were being treated was there any one present other than Miss King?

A. There was, but I don't recall who it was.

Q. Did you see a Mrs. Richards there at that time?

A. I don't recall seeing Mrs. Richards. She could have been there.

(Testimony of Lee James Nielson.)

Q. Do you recall making any statements at that time in substance and to the effect that it had to be the truck's fault, that is, the fire had to be the truck's fault? A. No.

Q. Now, Mr. Nielson, did you make any statement that it was the fault of the truck? Did you ever make such a statement?

A. No, not that it was the fault of the truck.

Q. Did you make any report to Mr. Odermatt?

A. Yes, I did.

Q. When did you make that report?

A. I went into Wells with a man on a truck.

Q. You got a ride into Wells? A. Yes, sir.

Q. Did you ever return to the scene of this fire on that day?

A. After I had reported to Mr. Odermatt, I found him at the Chevy station, or at the station, and he made sure that my burns were all right and then I returned to the fire. [429]

Q. You were able to go back to it?

A. Yes, sir.

Q. What time did you arrive back there?

A. It was approximately 4:30 or so, I don't know for sure exactly.

Q. Did you notice whether or not any business was being conducted at that place at that time?

Mr. Parry: Objected to as immaterial.

The Court: What is the materiality of that?

Mr. Halley: Well, your Honor, they deny they were conducting any business following the fire and we would like to show that at this place of business

(Testimony of Lee James Nielson.)

certain conversations were had with Mr. Herzinger.

The Court: They have taken out of this case the question of profits.

Mr. Halley: That is true.

The Court: So it would be immaterial. Objection is sustained.

Q. Did you see Mr. Herzinger at that place after you returned with Mr. Odermatt?

A. Some time later, yes.

Q. How much later?

A. Oh, maybe a half hour or so.

Q. Where did you see Mr. Herzinger?

A. The first I seen Mr. Herzinger was when he parked his car. [430] He drove in after we arrived there.

Q. He came to the place after you arrived?

A. After we arrived.

Q. Was any conversation had with Mr. Herzinger by Mr. Odermatt in your presence?

A. Mr. Herzinger had very little to say to Mr. Odermatt at that time.

Q. Was there a conversation, if you recall?

A. I don't recall any conversation. He wanted him to talk but he wouldn't.

Q. Mr. Herzinger wouldn't talk?

A. Mr. Herzinger wouldn't talk.

Q. What is your height, Mr. Nielson?

A. Six feet.

Q. You say you lifted up this hose after you disconnected it from your truck. How high did you lift the hose?

(Testimony of Lee James Nielson.)

A. I held the hose tight above my head quite a heighth, to drain.

Q. You held it over your head?

A. Over my head.

Q. And tight? A. That's right.

Direct Examination

By Mr. Platt:

Q. When you held the hose high up over your head, as you [431] have just illustrated, was the hose connected to the truck or disconnected?

A. The hose was disconnected from the truck.

Q. At that time was the flow of gasoline from the truck shut off?

A. The delivery was finished then. It was shut off.

Q. And how long was that hose? What is the length of it?

A. Approximately ten feet long.

Q. And then as I understand further, you took your head as you have illustrated, it was disconnected and the other end of the hose was at the intake of the tank? A. In the filler pipe, yes.

Q. And then as I unedrstand further, you took —correct me if I am not accurate on this——

Mr. Parry: I object to this line of questioning as being leading and this is not cross-examination.

The Court: The objection is sustained.

Q. You say the hose was lying on the ground. When did you put it on the ground?

(Testimony of Lee James Nielson.)

A. After I had drained it and finished my delivery.

Q. What did you do with the other end of the hose before you put it on the ground?

A. The other end of the hose was still in the filler pipe.

Mr. Platt: That is all. [432]

Cross-Examination

By Mr. Parry:

Q. Mr. Nielson, I take it you have lived in or near Wells substantially all your life?

A. I have.

Q. How long a time have you known Mr. Odermatt?

A. Several years. I am not positive, eight or ten years.

Q. This was a '42 Ford, as I understand?

A. '42.

Q. How many miles did it have on at the time of this accident? A. To that I am not sure.

Q. Quite a large mileage, I assume. It had been his only truck; he had used it for a long time?

A. Yes.

Q. How much did a thousand gallons of gasoline weigh? A. That I don't know.

Q. What else did you have on that truck that day beside gasoline?

A. I had a barrel of Blazo, or white gasoline.

Q. How much would that weigh?

A. About 500 pounds.

(Testimony of Lee James Nielson.)

Q. How many gallons would there be in it?

A. Fifty-three.

Q. How much would the empty barrel weigh?

A. That I don't know. [433]

Q. Could you approximate?

A. It would be pretty hard.

Q. Well, you have lifted a lot of those barrels, haven't you? A. Quite a few.

Q. Can you lift them yourself?

A. We don't lift the barrel off the ground.

Q. I mean an empty barrel.

A. Even an empty barrel, we do not lift; we pry.

Q. What would you estimate an empty barrel would weigh? A. Forty pounds.

Q. And the full barrel would weigh how much?

A. Maybe five hundred, in the vicinity.

Q. What else did you have on beside this Blazo?

A. There were two 5-gallon cans of oil, some kind of oil.

Q. What else? A. And I think that is all.

Q. Didn't you have some Flamo on there?

A. I had delivered to Mr. Herzinger some Flamo. I had taken that off the truck.

Q. How much Flamo did you have on there?

A. That I don't recall.

Q. How do you haul that, in a heavy cylinder?

A. That's right.

Q. What do one of those cylinders weigh?

A. Approximately 80 or 90 pounds. [434]

Q. Can you lift those yourself?

A. As I said before, heavy articles like that we

(Testimony of Lee James Nielson.)

don't lift these, we pry or use a brace against them.

Q. When you unload?

A. We roll them off onto the ground from the truck.

Q. This barrel of Blazo and Flamo was on a little rack on back of the truck? A. Yes.

Q. So you had this five compartments of gasoline and this other, is that correct?

A. That is right.

Q. You state you left Wells about 11:00 o'clock?

A. Aproximately 11:00.

Q. You go up a long hill for quite a ways, what they call the summit?

A. The hill is approximately three-quarters of a mile, gradual in slope.

Q. How far is it from Wells out to what they call the summit where you go into Thousand Springs Creek watershed A. Eighteen miles.

Q. For the first 18 miles from Wells then you go up this long hill, up the summit. With little variations that is generally up hill?

A. It is rolling.

Q. And you are going higher all the time? [435]

A. No.

Q. Isn't there a divide between the Humboldt River and Thousand Springs Creek which flows to the east?

A. The Humboldt River, I don't go into that part of the country.

Q. You are in the Humboldt River watershed?

A. The Humboldt River starts at Wells.

(Testimony of Lee James Nielson.)

Q. Wells and the Humboldt River watershed, isn't it? A. I don't know.

Q. And the water and snow melts and falls over in the north of Wells, drains towards Wells, does it not? A. To a certain extent.

Q. Do you or don't you go over a summit 18 miles north of Wells where you go into Thousand Springs? A. Yes, sir.

Q. That summit there is seven thousand feet high? A. That I don't know.

Q. But it is considerably higher than Wells?

A. Well, it is rolling.

Q. I said the summit is considerably higher than Wells, answer yes or no, if you know.

A. I don't know.

Q. When you are coming the other way, from the direction of Contact and Thousand Springs, you go over that summit and you come to these Ruby Mountains and you can't see them until you go [436] over that summit, can you?

A. As I recall you can't if you are coming from north to south, you can't see until you get over the summit.

Q. You have to get pretty close to the top?

A. From a distance, no.

Q. But you agree there is a summit there?

A. That is right.

Q. And then after you go across Thousand Springs valley you go over another summit until you go over the watershed to Salmon Springs hills? I said, you go over another summit?

(Testimony of Lee James Nielson.)

A. I am not sure what you mean by summit.

Q. I mean division between two watersheds.

A. I don't know anything about watersheds.

Q. Do you know anything about a high point that you go over? A. Sure, you go over hills.

Q. And you had a good load on that day coming up there, didn't you? A. Yes.

Q. And you had to shift gears from time to time, didn't you? A. A couple of times.

Q. And you go places in the lower gear?

A. No, you never go below shifting into second.

Q. And places where you drive for quite a long distance in second?

A. Not more than, as I said before, three-quarters of a [437] mile up.

Q. The rest of the way you drive up in high gear then? A. I think so.

Q. And about what time did you get to Contact?

A. It was a little bit after twelve, around noon.

Q. Did you see Mrs. Richards there?

A. No, I did not.

Q. Did you stop there?

A. No, sir, I did not.

Q. And you went up to the Mineral Hot Springs next then, as I understand? A. That's right.

Q. When, after you stopped there at Mineral Hot Springs, did you first go inside?

A. Not until after I had driven my truck to the outside tank.

Q. You first went to the inside tank?

A. To the inside.

(Testimony of Lee James Nielson.)

Q. How many gallons did you put in that?

A. About 200.

Q. You put in 200 because you drained one compartment? A. Drained one compartment.

Q. How long did that take?

A. Possibly 8 to 10 minutes.

Q. And then you put in some out of the other tank? [438]

A. Approximately 20 or 30 gallons.

Q. Did you guess at that? A. Yes, I did.

Q. And then during all that time you didn't go inside? A. No.

Q. Did you talk to any one?

A. The only talk I had was Mr. Moseley told me that the outside tank was dry.

Q. Where was he when he said that?

A. He was behind the bar.

Q. Where were you when you talked to him?

A. Walking around the back end of the truck.

Q. When you emptied the first tank, where was the front of your truck with reference to one of the doors to the place?

A. It was about even. The front end of my truck was approximately even with the grocery store door. Could have been a little bit to the north.

Q. How long is your truck?

A. It would have to be a guess.

Q. What is your best estimate?

A. Maybe 16 feet long.

Q. Where were you standing with reference to that truck when you talked to Mr. Moseley?

(Testimony of Lee James Nielson.)

A. I wasn't standing, I passed by.

Q. Passed by what? [439]

A. The rear end of the truck.

Q. What part of the rear end of the truck, corner, back or what?

A. I had to go clear around the truck. I don't remember the exact spot when he told me that.

Q. Where were you when you talked to Mr. Moseley?

A. Going around back end of the truck.

Q. What did you say?

A. I didn't say anything at all.

Q. What did he say?

A. He said, "Hi," and also the outside tank was empty.

Q. That is the first you knew that the tank was empty? A. That is right.

Q. Then what did you do?

A. I proceeded with my delivery.

Q. What did you do with the truck?

A. Left it there.

Q. Have you ever worked at a service station?

A. Yes, I have.

Q. You have filled the tanks of passenger cars, I take it, by pulling a hose, draining your gas into it?

A. By holding the hose and draining the gas.

Q. Into the tank of the passenger car?

A. From the pumps, yes.

Q. Sometimes those will start to bubble up,

(Testimony of Lee James Nielson.)

maybe flow over, [440] even though the tank isn't full?

Mr. Vargas: We will have to object to that, not proper cross-examination. Has nothing to do with the issues of the case.

The Court: Objection is overruled.

(Question is read.)

Q. Is that correct? A. Yes.

Q. And that happens sometimes when you are filling these gasoline tanks?

A. If the air vent isn't right.

Q. It sometimes happens, doesn't it?

A. If the air vent isn't right, yes.

Q. When you come to an empty tank like that outside tank, of course, that naturally is full of vapor, the tank itself, if it doesn't have gasoline, it has some kind of vapor in it, doesn't it?

A. Yes, I guess it has.

Q. And as you pour the liquid into the tank, of course, that forces that vapor out, doesn't it?

A. Correct.

Q. And it is the vapor from gasoline which is the explosive or inflammable part of it, isn't it?

A. That would have to be a guess. I am not positive of that question. [441]

Q. Did you ever run an automobile?

A. I have.

Q. Ever fool with the carburetor?

A. Very little.

Q. But you have some? A. Some.

(Testimony of Lee James Nielson.)

Q. And it takes a mixture of gasoline vapor and air to be explosive, doesn't it?

A. I think it does, yes.

Q. And this vapor that is in one of these tanks is highly inflammable or explosive, isn't it?

A. I guess it is.

Q. And you spent how much time at that outside tank? A. At the outside tank?

Q. Yes. A. Altogether?

Q. Yes. A. Oh, maybe 25 minutes.

Q. When did you first step in to what we call the bar room of this Mineral Hot Springs place?

A. After I had finished filling the inside tank, drained my hose, put it on the truck, backed out and returned to the outside tank.

Q. That was while the outside tank was running?

A. No, I had finished my delivery. You asked me—— [442]

Q. I said, when did you first step into the bar room?

A. After I connected the truck and started delivery on the second 300-gallon tank.

Q. And while that was running you went in and got the Pepsi Cola? A. That's right.

Q. And you talked some to Mr. Moseley?

A. Yes.

Q. And you were in there for some length of time? A. For only a few seconds.

Q. Well, you were at least there for some length of time? A. Some.

(Testimony of Lee James Nielson.)

Q. You asked for what you wanted to drink?

A. That is right.

Q. And he took the time to get it. Where did he get it from?

A. I think he had it in the icebox right there, right in front.

Q. And then he opened it? A. Opened it.

Q. And you exchanged some conversation there?

A. Yes.

Q. You and Mr. Moseley were at least well acquainted—you had been coming up there once a week or so a good many months? A. Yes.

Q. And you were accustomed to talk when you got up there? [443] A. Right.

Q. And you were friendly? A. Right.

Q. And you chatted with him at least a sentence or two while you were there?

A. Quite possible.

Q. And as I understood you to say, you probably took two or three swallows of your drink while you were in there? A. Right.

Q. And then how long a time after you went outside after that visit was it before you went back in again?

A. I hadn't gone back in until I had finished my delivery.

Q. How long a time was that?

A. Oh, approximately 15, about 15 minutes or so.

Q. When you went back in again, had you done any writing in your book?

(Testimony of Lee James Nielson.)

A. After I made my delivery and returned to the building, I had done no writing.

Q. How much money did you put in this panorama machine? A. One nickel.

Q. Are you sure it operates on a nickel?

A. I am almost sure. It may have been a dime, I am not quite positive.

Q. What position were you facing when you heard Bill Hack holler "Hey"? [444]

A. I was facing east, about three feet away from the bar.

Q. And then you turned around?

A. When he hollered "Hey," I turned.

Q. And as you went out, how did you go around your truck?

A. To the rear of the truck, the south end of the truck.

Q. How many feet do you think you had to run from where you were standing to the point where you got in your truck?

A. Probably 30 or 35 feet.

Q. Do you know the elevation there at Mineral Hot Springs? A. No, I do not.

Q. Do you know the elevation at Wells?

A. Yes, I do.

Q. What is it at Wells? A. 5600 feet.

Mr. Parry: I think that is all.

(Testimony of Lee James Nielson.)

Redirect Examination

By Mr. Halley:

Q. I believe, Mr. Nielson, you stated you had worked in a service station and you know an empty gasoline tank will bubble up sometimes when it is being filled? A. I have seen it.

Q. Do you know whether or not the tank or car, motor vehicle, has a vent in it like these underground tanks?

A. To my knowledge, what vents I have seen in cars are really smaller pipes that could be dented by putting a nozzle [445] into it.

Q. You had been working for Mr. Odermatt for over a year when this fire happened, is that right?

A. That's right.

Q. And you had been delivering to Mr. Herzinger's place? A. Yes, I had.

Q. During that year had you had any experience of these underground tanks bubbling up when they were empty and you were attempting to fill them?

A. No, none whatsoever.

Q. Do you recall the temperature on this particular day, May 3rd, at Mineral Hot Springs?

A. Well, it was quite warm. I would say about, oh, approximately eighty.

Q. Now in proceeding from Wells to Contact and on the Mineral Hot Springs, had you experienced any difficulty with your truck heating?

A. No, none whatever.

Q. Did it heat up at all? A. No.

(Testimony of Lee James Nielson.)

Q. Did you notice whether or not the water in the radiator boiled?

A. Not by the gauge, it wasn't boiling, no.

Q. How long had you been at Mineral Hot Springs when this fire occurred? [446]

A. Oh, I would say approximately 40 or 45 minutes.

Q. During that period of time how long was your truck actually running the motor?

A. As soon as I finished I turned off my truck.

Q. How long was it running in moving it from under the canopy to outside the canopy?

A. Not more than a couple of minutes.

Q. And approximately how long was it standing outside the canopy before the fire?

A. Oh, 30 to 40 minutes, I think.

Q. Did you notice any heat coming from the truck during that period of time? A. No.

Q. I believe you said you delivered some Flamo to Mr. Herzinger's place? Did they have Flamo equipment up there?

A. To my knowledge they did.

Q. What Flamo equipment did they have there?

A. Now I am not positive as to that.

Q. Where is the Flamo tank located on the premises?

A. I think it was on the south side of the building.

Q. Prior to May 3rd, the date of this fire, when had you last been to Contact or Mineral Hot Springs in this particular truck?

(Testimony of Lee James Nielson.)

A. That I don't remember.

Q. Well, would it be a few days? [447]

A. Just a few days, yes.

Q. Do you recall the temperature on that particular day? A. No, I don't.

Q. Where had you made delivery prior to May 3rd?

A. Now I am not sure on that. It could have been both places, Mr. Herzinger's and Ray King's, I am not sure.

Q. Do you remember the weather conditions that day, as to wind, Mr. Nielson?

A. As I recall, it was very still that day, no wind.

Q. Let me ask you this—the flames that were on top of your truck, were they going in any particular direction other than up?

Mr. Parry: Objected to as improper re-direct. I asked no questions on that on cross-examination.

The Court: Objection overruled. Answer the question.

(Question read.)

A. No, not that I recall.

Q. Did you observe the direction of the flames of the burning structure?

A. No, I didn't either.

Mr. Halley: That is all.

Mr. Platt: I have no further questions.

Mr. Parry: No further questions, your Honor.

Witness excused. [448]

JAMES ZILLIOX

a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Puccinelli:

Q. Will you state your name?

A. Jim Zilliox.

Q. Where do you live, Mr. Zilliox?

A. At present about three-quarters of a mile south of Kimberly in Idaho.

Q. How long have you lived in the State of Idaho?

A. I moved there the last day of April of last year.

Q. That would be 1949? A. That's right.

Q. Mr. Zilliox, prior to that time where did you live?

A. Well, I lived in Montana November, 1914, around Granger, ranching for the Utah Construction.

Q. How long were you employed by the Utah Construction?

A. From 1914, I believe they sold out March, 1945; outside of the first World War about 16 months.

Q. Where were you living on or about the 3rd day of May, 1947?

A. I was in San Juacinto, Nevada.

Q. Where is San Juacinto, Nevada, in relation to the Mineral Hot Springs?

(Testimony of James Zilliox.)

A. Well, it is about six miles, could be 6½, but I would say about six. [449]

Q. In what direction?

A. Pretty near straight north, off the highway about a mile.

Q. And it is about six or seven miles north of Mineral Hot Springs? A. Yes, sir.

Q. About a mile off the highway? A. Yes.

Q. San Juacinto is the headquarters for the U. C. Land and Cattle Company?

A. It is for the north part of the division, San Juacinto headquarters. We had one headquarters at Montello, too.

Q. Mr. Zilliox, do you know Lee Nielson?

A. Oh, yes, at San Juacinto.

Q. Had you known him prior to the 3rd day of May, 1947? A. Yes, sir.

Q. Directing your attention to the 3rd day of May, 1947, I will ask you to state if you saw Lee Nielson on that day? A. Yes, sir.

Q. Where did you see him?

A. Well, he was about 200 yards off the highway of Mineral Hot Springs, trying to put his truck out.

Q. What, if anything, was wrong with the truck when you first saw Lee Nielson, if you know?

A. Well, there was two of the top tanks on fire and he was throwing dirt and all around there with a shovel and pick and [450] I said, "What started the fire?" and he said, "I don't know, Jim."

Q. After you attempted to assist Mr. Nielson in putting the fire out by throwing dirt on it with your

(Testimony of James Zilliox.)

shovel, please state what, if anything else you did to put out the flames on the truck?

A. Well, I went back across the highway. I knew I had a canvas in the back of the truck and by that time my wife drove up from San Juacinto and I ran over to my truck with my own car and got a blanket and got a canvas and put the blanket over the top of the spouts that were burning and smothered it down.

Q. I think you used the word "spouts"?

A. Well, where you put your gasoline in on top.

Q. I will ask you to state, Mr. Zilliox, whether or not any other portion of the truck was aflame or in flames, other than the spouts on top of the tanks?

A. No sir, these two spouts on the top of the tanks is all.

Q. Now at the time you first saw Mr. Nielson and began to assist him by throwing of dirt, I will ask you to state whether or not you observed Mr. Nielson's condition at that time with reference to being burned or not being burned?

A. He didn't have any burns, not then when he was shovelling the dirt.

Q. After you had assisted Mr. Nielson in extinguishing the fire by the use of blanket and this canvas, I will ask you [451] to state if you had opportunity and did observe his condition then with reference to being burned or not?

A. Well, after that it looked like his hands were burned a little, not bad, red, not bad, and also his face was red and had a lot of dirt on it.

(Testimony of James Zilliox.)

Q. Did you and Mr. Nielson complete putting the fire out by the use of this canvas and blanket?

A. Yes, we did.

Q. Then what, if anything, did you and Mr. Nielson do?

A. Well, there were cars standing off the highway, didn't want to go by him, and I got a chain and hook and turned around and backed on to the gasoline truck and pulled it off toward the hot spring of the Hot Springs ranch.

Q. Then, Mr. Zilliox, what, if anything did you do?

A. Well, I got in the truck and went up to the fire to see if I could help them.

Q. Now describe the condition of the premises at the time you arrived at Mineral Hot Springs?

A. Well, I just drove up, and a lot of people around, parked my car on the left side coming south and went around the east side and Ray Ward was there and his wife and two boys and Mr. Moseley was there and Bill Hack and Mr. Klitz and another fellow that worked there, called Junior, I don't know his name, and then a fellow who worked for us called Butch Yaeger, he and his wife worked for the company. [452]

Q. Please state what they were doing.

A. Well, the trailer house was sitting there and I asked Ray why they didn't put it out of the way.

Q. By that trailer house you mean the trailer house which has been designated to the east of the improvements with the letter "T"?

(Testimony of James Zilliox.)

A. Yes, sir.

(Noon recess taken at 11:50 a.m.)

February 15, 1950, 1:30 P.M.

Presence of the jury stipulated.

Mr. Zilliox resumes the witness stand on further

Direct Examination

By Mr. Puccinelli:

Q. Mr. Zelliox, just prior to the recess you were relating having left the place where you moved the truck and having gone to the Mineral Hot Springs. Now upon your arrival at Mineral Hot Springs who, if any one, did you see?

A. Well, there was Bill Hack and Dale Klitz and a fellow named Bill Yeager and his wife, always called him Butch at the ranch, and a guy called Junior and Mr. Moseley and Ray Ward, his wife and two boys. That's all I remember now. There could have been some more.

Q. Upon your arrival please state what, if anything, you did?

A. When I first got there the trailer house wasn't on fire and I asked Ray why he didn't push it out of the way. [453]

Mr. Parry: I object to that as hearsay.

The Court: The latter part may go out, that portion of the conversation with some one there.

Q. By the trailer house you mean this trailer house designated with the letter "T"?

A. Yes, sir.

(Testimony of James Zilliox.)

Q. Now at the time you arrived there, did you have a chance to observe the condition of the buildings?

A. Well, when I first got there the front end of the store was on fire and a good deal of it was caved in, the back end of the saloon wasn't burning, which is where they had this whiskey stored, and that lower building, the oil house, wasn't on fire. That is when it got on fire, when the flame came across to get on the trailer house and we started to put it out, me and Ray Ward.

Q. As I understand your testimony, when you finally arrived there this trailer house was not burning? A. No, sir.

Q. The oil house was not burning?

A. No, sir.

Q. The rear of the bar was not burning?

A. No, sir, the bar doors wasn't burning.

Q. What other buildings which are designated on this map were not burning at the time you got there, Mr. Zilliox?

A. That oil house and this little building way over there [454]wasn't burning.

Q. Designated as the pump house?

A. Yes.

Q. That was not burning? A. No, sir.

Q. Now when you arrived there, please state what, if any, effort any one was making to fight the fire?

A. When I got there they were all either drinking beer or whiskey, sitting down, just standing there.

(Testimony of James Zilliox.)

Q. Did you do anything to combat the fire?

A. Yes, sir. I got hold of Junior and asked him where there was a bucket. He said what for, there was no water in the hydrant and I said yes, there was.

Mr. Parry: I move to strike that as hearsay conversation.

The Court: The conversation may go out.

Mr. Puccinelli: Please restrict yourself, Mr. Zilliox, to what you actually did.

A. Well, what I actually done, I got a bucket, Junior got a bucket for me, and I got some water and I told Junior to get on top of the stone building back of the trailer house.

Q. And did you extinguish that fire?

A. Yes, sir.

Q. Where did you get the water from to extinguish the fire?

A. There was a hydrant between the pump house and the store, [455] right outside.

Q. Now who is Junior?

A. I don't know. He worked there. Young fellow between 18 and 20, is all I know. He worked there, they called him Junior.

Q. Prior to the recess you stated on direct examination, Mr. Zilliox, that you pulled the truck off the highway down off the road?

A. Yes, I hooked on with a chain and pulled it off the road.

Q. Why pulled?

(Testimony of James Zilliox.)

A. People standing there, seemed like they were scared it would get on fire so I decided to pull it off.

Q. Was it because of any mechanical defect, the motor wouldn't run? A. No.

Mr. Parry: Objected to—no proper foundation whatever for the questions.

The Court: Objection sustained.

Q. What did Mr. Nielson do?

A. He got in and steered the truck away and I hooked on to my truck and pulled off the road toward the tent house.

Q. Tell me, Mr. Zilliox, how much time, to the best of your recollection, elapsed or passed between the time that you came on Mr. Nielson on the highway and you helped him put the fire out, pulled the truck off, and then you finally got down to the area of the Mineral Hot Springs? [456]

A. Oh, it would be somewhere between 10 or 15 minutes. It could have been a little more.

Q. What is your best recollection, Mr. Zilliox, as to the weather conditions that day, with reference to there being a wind or there not being a wind?

A. Well, I would say there wasn't any wind because smoke and fire was going straight up in the air. Somewhere around, I would say, between 65 and 75 degrees.

Mr. Puccinelli: That's all.

Cross-Examination

By Mr. Parry:

Q. How far was the Ward ranch from the buildings at Mineral Hot Springs?

(Testimony of James Zilliox.)

A. The tent house between a quarter and a half mile.

Mr. Parry: That is all.

FRANCIS HARMER

a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Vargas:

Q. Will you state your name please?

A. Francis Harmer.

Q. Where do you live, Mr. Harmer?

A. Contact, Nevada.

Q. About how long have you been a resident of Contact, Nevada? A. Eighteen years.

Q. What is your business or employment? [457]

A. Maintenance foreman, State Highway Department.

Q. Approximately how long have you occupied that position with the Nevada State Highway?

A. For 18 years.

Q. You were then stationed at Contact, Nevada, that is, living there, on or about the 3rd day of May, 1947, the day of the fire involved in this action?

A. Yes, sir.

Q. Have you had occasion, Mr. Harmer, to drive from Wells to Contact? A. Yes, sir.

Q. What, if you know, is the approximate elevation of Wells, Nevada? A. 5600 feet.

(Testimony of Francis Harmer.)

Q. And what, if you know, is the approximate elevation of Contact, Nevada?

A. It is 5320 feet.

Q. Now what highway do you travel going from Wells to Contact? A. U. S. 93.

Q. Will you just generally describe the course of the terrain between Wells and Contact driving north from Wells to Contact?

A. Well, there are two summits, the one summit approximately 18 miles north of Contact—north of Wells—and the grade on the south side of the summit, I should judge, isn't much over four per cent, if it is that, and it isn't very long, and then [458] after you top over what we call——

Q. That is 18 miles out of Wells?

A. Eighteen miles. You have six miles of all down hill and after you pass that to where what we call the Thousand Springs and then from there you have another summit with a slight grade, about three per cent, that is five miles long, and then from there clear into Contact, outside of rolling hills, it is all down hill.

Q. From the point last mentioned into Contact, that is with the exception of rolling hills, downhill what is that distance? A. From Contact——

Q. From the point where you last mentioned, where you start down hill to Contact—you said it was down hill with the exception of some rolling hills. What is the distance of that?

A. About 19 miles.

Q. So for approximately some 19 miles south of

(Testimony of Francis Harmer.)

Contact and on in to Contact you are going down hill, with the exception of this rolling grade?

A. That's right.

Q. What is the distance, approximately, if you know, from Contact to Mineral Hot Springs, the property of Mr. Herzinger?

A. Right at a mile and a half.

Q. And is that up hill or down hill or level, or what?

A. There are two slight hills between Contact and the Mineral Hot Springs. [459]

Q. Do you know Mr. Herzinger, the plaintiff in this case? A. I do.

Q. Do you know Mr. Moseley, his manager?

A. I do.

Q. Are you generally familiar with the premises which have been drawn on the board here of Mineral Hot Springs? A. Fairly well, yes.

Q. Have you ever had occasion to look at the electrical wiring system at Mineral Hot Springs?

A. One time when Mr. Brown was there.

Q. Do you recall about when that was?

A. Just prior to the purchase of the place by Mr. Herzinger.

Q. What was the occasion which caused your examination of the wiring system at Mineral Hot Springs at that time?

Mr. Parry: We object to any further testimony along this line.

(Jury excused and argument in the absence of the jury.)

(Testimony of Francis Harmer.)

The Court: I believe the question will be proper so the objection will be overruled.

Presence of the jury stipulated.

Direct Examination
(Continued)

By Mr. Vargas:

The Court: I wonder if we could fix a little more definitely how long?

Q. Do you recall, Mr. Harmer, about when Mr. Herzinger acquired this property from Mr. Brown? [460] A. That he asked me——

Q. Can you fix approximately the date when he asked you to do the work on the wiring?

A. I imagine it was a month or two before that, I would say.

Q. Before Mr. Herzinger acquired the property from Mr. Brown? A. Yes.

Q. Now what was the occasion, Mr. Harmer, for your inspection or examination of the wiring system, electric wiring system, at Mineral Hot Springs at that time?

Mr. Parry: We object, too remote, within a month or two.

The Court: Objection sustained.

Mr. Vargas: If the Court please, we would like to be heard on that matter.

The Court: If it was just prior, a few days, I would admit it, but not within two or three months. The ruling will stand.

(Testimony of Francis Harmer.)

Q. After Mr. Herzinger acquired this property, were you ever down or around Mineral Hot Springs?

A. Occasionally I was.

Q. On any of those occasions, after Mr. Herzinger acquired this property, did you observe anything with reference to the electric wiring system?

A. No, I had not.

Q. Now calling your attention to the day of this fire, Mr. [461] Harmer, May 3rd of 1947, will you state whether or not you had on or prior, that is before that date, ordered any gasoline from Mr. Odermatt? A. I had.

Mr. Parry: Objected to as immaterial.

The Court: Is it preliminary?

Mr. Vargas: Yes, your Honor. I am perfectly willing to state my purpose.

Mr. Parry: I withdraw the objection.

The Court: Answer the question.

Q. You had orders for gas? A. Yes, sir.

Q. Do you recall how much you had ordered?

A. I had ordered a load, what Mr. Odermatt could haul.

Q. That was for the State Highway Department?

A. That was for the State Highway Department.

Q. Now following the fire was there delivered to you any gasoline by Mr. Odermatt?

A. About three days later we unloaded some.

Mr. Parry: Objected to as too remote.

The Court: This is gas being delivered by Mr. Odermatt to the Highway Department?

Mr. Parry: Immaterial—outside the issues.

(Testimony of Francis Harmer.)

Mr. Vargas: It is preliminary. I will state the purpose if desired. [462]

Mr. Parry: If it is preliminary, I will withdraw my objection.

(Question read.)

A. We unloaded the remaining gas that was on the truck.

Q. Was that from the same truck that was there at Hot Springs on the day of the fire?

A. Same truck.

Q. Did you have occasion at that time to observe the general condition of that truck?

A. Yes, sir.

Q. Where was the gasoline unloaded, at what place? A. You mean——

Q. The gasoline you had ordered and was unloaded from that truck?

A. It was unloaded at the maintenance station at Contact.

Q. How did the truck get into the maintenance station at Contact at that time?

A. Mr. Nielson and Mr. Odermatt drove it up to the station that night.

Q. You say that night?

A. That was the night of the fire.

Q. The night of the fire the truck was driven by its own power up to the Highway maintenance station? A. Yes, sir. [463]

Q. And the same day or two days later the gasoline was unloaded?

A. Yes, Mr. Odermatt asked permission to leave

(Testimony of Francis Harmer.)

the truck in the yard and he also told me if I needed some of the gas to take some, if I was short, out of the truck and use it.

Q. While the truck was at the Nevada State Highway Maintenance Station, did you have occasion to observe the general condition of the truck?

A. Yes, sir.

Q. Would you please describe to the members of the jury and the Court the general condition of that truck?

A. Well, the gas tanks on the top was burned and the top portion of the flat rack was charred just a little and the back end of the cab had never been hot enough to blister or burn, just slightly scorched, and there had been no fire under the truck. There were no burned places under the truck. I even looked under the hood and there hadn't been any fire under the engine.

Q. Do you know of what material the flat rack on that truck was constructed?

A. It was constructed of wood.

Q. Did you observe anything with reference to the wiring running to the various lights on the truck?

A. No, not particularly I didn't. [464]

Q. What was the condition of the tires on the truck with reference to the presence or absence of damage from fire?

A. I couldn't see no damage.

Q. Did you observe anything which may have

(Testimony of Francis Harmer.)

been fitted under the bed of the truck, any equipment or anything of that kind?

A. Yes, on the right-hand side of the truck he packed a hose that he delivered the station oil and used for pump purposes, and the hose was intact.

Q. How was that hose under there, was it on a reel, or how was it? A. It was on a reel.

Q. Where was it in conenction with the rear wheels?

A. Set just ahead of the rear wheels on the right-hand side.

Q. And will you state whether or not that coil of hose showed any evidence of fire damage or having been on fire at all? A. No, it didn't.

Q. Do you recall, Mr. Harmer, anything with reference to weather conditions on the day of this fire up there? A. The weather conditions?

Q. Yes.

A. It was a cool day, no wind of any degree.

Q. Have you had occasion to observe the unloading of gasoline from this particular truck at the Highway Maintenance Station?

A. Several times.

Q. Will you please describe to the ladies and gentlemen of the [465] jury and the Court the manner in which the hose connection is made for the purpose of unloading gasoline from this truck, if you know?

A. The driver drives up along the side of the building where we have our tank and he never has to check our tank because I always know what our tank will take. When he drives up he always takes

(Testimony of Francis Harmer.)
his hose off the truck and puts the nozzle end into the filler stand and then he has this bronze connection on the other end of the hose, which he passes through his truck and he always puts that on and screws it up as tight as he can with his hands and then they have a wrench, what they call a Standard wrench, and puts that on there and tightens it on down, hits it with his hand generally, to cinch it up tight.

Q. Can you generally describe this Standard wrench, what it looks like?

A. Well, I imagine there are several types of Standard wrenches. The type he uses is similar to the type the fire department uses to put their hose on a fire plug when they go to a fire. The type the fire departments use have a hole in one end and goes over it in a half circle. The type the driver of the truck uses for that type of fitting fitting has a slot on the end that fits on the connection on hinges.

Q. What can you state with reference to the unreeling of the hose from the tank truck?

Mr. Parry: I object to further testimony as to what [466] happened. It is too remote and not connected with the issues.

The Court: Answer the question.

A. They always have this wrench to disconnect the hose.

Mr. Parry: I move the answer be stricken as to what they always have. It is conclusion of the witness and not responsive.

The Court: The motion will be denied.

(Testimony of Francis Harmer.)

Q. Were you at the premises of the Mineral Hot Springs at all on the day of this fire, Mr. Harmer?

A. Yes, towards the last of it I was.

Q. About what time was it when you went up there?

A. I believe around 2:30 to three o'clock.

Mr. Vargas: That is all.

Mr. Platt: No questions.

Cross-Examination

By Mr. Wilson:

Q. Mr. Harmer, you testified, from Wells to Contact there are two summits, one of which you approach on about four per cent grade, the other on three per cent. Now directing your attention to the first summit out of Wells toward Contact, do you recall the altitude of that particular summit?

A. The first one I mentioned 18 miles out?

Q. Yes.

A. No, I don't recall the exact altitude. I would be giving a good guess. [467]

Q. Is it generally uphill from Wells to the summit? A. Well, it is—no, it isn't.

Q. It goes over hills and down?

A. Goes over hills gradually——

Q. And gradually rises to the summit?

A. That's right.

Q. Is that the summit that forms the divide between the Humboldt River and Thousand Springs Creek? A. Yes.

Q. That is called the HT summit? A. Yes.

(Testimony of Francis Harmer.)

Q. The water runs one way on one side and the other way on the other side? A. That's right.

Q. Mr. Harmer, I am going to hand you Plaintiff's Exhibit 27, here marked for the purpose of identification, and ask you if that picture fairly portrays the truck, physical condition of the truck, as of the date of your inspection of the same at Contact? A. Yes.

Q. I am now going to hand you Plaintiff's Exhibit 28, so marked for the purpose of identification, and ask you if that adequately and accurately portrays a picture of the portion of that truck at Contact the date you made inspection of the same?

A. I would say yes. [468]

Mr. Wilson: At this time I wish to offer in evidence, your Honor, Plaintiff's Exhibit 27 for identification and Plaintiff's Exhibit marked 28 for identification.

Mr. Vargas: The defendant Odermatt has no objection.

Mr. Platt: We have no objection.

The Court: The exhibits may be admitted, Nos. 27 and 28.

Q. I believe, Mr. Harmer, you stated there was a hose on a reel? A. Yes.

Q. And that hose was some place on the truck?

A. No.

Q. I hand you Plaintiff's Exhibit 27 in evidence and have you hold it toward the jury and explain, if you can, where that hose was.

(Testimony of Francis Harmer.)

A. Underneath in this box.

Q. That is a box or compartment underneath the truck? A. That's right.

Q. I might ask you one question which would fit into their understanding of the pictures. Was that box compartment under the truck housing this hose wood or metal? A. I believe it was metal.

Mr. Wilson: I have no further questions.

Mr. Vargas: If the Court please, I would like at this time to excuse Mr. Harmer temporarily and call Mr. Moseley. [469]

The Court: Does Mr. Platt have any questions?

Mr. Platt: No questions.

The Court: You may be excused.

ROSS FRED MOSELEY

having been previously sworn, testified as follows:

Direct Examination

By Mr. Vargas:

Q. I believe you testified that you were at Mineral Hot Springs approximately a year and a half before Mr. Herzinger took it over?

A. In the summer before he took it over in February.

Q. Mr. Herzinger acquired the property in February of 1946? A. I believe so.

Q. And you came on the Mineral Hot Springs property first approximately what date?

A. I believe December, 1945.

Q. So you were there some three months before Mr. Herzinger took it over? A. Yes.

(Testimony of Ross Fred Moseley.)

Q. Who owned it during that time prior to Mr. Herzinger? A. Mr. Brown.

Q. Were there any electric light facilities at Mineral Hot Springs at the time you first went there, when Mr. Brown owned it?

A. Yes, sir. [470]

Q. In your examination you described and drew on the board the electric wiring system. Is that the system that was there while Mr. Brown owned it and when you first went there?

A. Yes, that's just about the same.

Q. I believe you testified that that system was in the same condition when Mr. Herzinger bought it from Mr. Brown?

A. Well, it had been repaired different times where it needed it, yes, sir.

Q. Do you recall who made any repairs to it?

A. Well, Mr. Harmer did some when Mr. Brown had the place.

Q. Do you recall about how long it was before Mr. Herzinger took it over that Mr. Harmer made the last repairs to the electric wiring system?

A. Well, I presume it was a while before.

Q. It was after you came there? A. Yes.

Q. From the time Mr. Harmer last repaired this electric system up until the time of the fire, did the electric system remain in the same condition?

A. Outside of minor repairs.

Q. Can you detail to me what those minor repairs were?

(Testimony of Ross Fred Moseley.)

A. Well, wire got tangled some place or something interferred with them.

Q. Do you have in mind, Mr. Moseley, any particular time after Mr. Harmer last repaired this system of the wires becoming [471] tangled?

A. There was a time between the bath house and the power house.

Q. Then the minor repairs that you speak of there were repairs to the system between what houses?

A. Between the power house and the bath house.

Q. Between the power house and some bath houses? A. That's right.

Q. Is that the only place where these minor repairs were had? A. To my knowledge.

Q. Then to your knowledge the remainder of the system was the same at the time of the fire as it was when Mr. Harmer last repaired it for Mr. Brown?

A. Well, practically, outside some minor repairs.

Q. Well, you have mentioned minor repairs being made on the line between the power plant and the bath houses. Can you tell me where any other minor repairs were made in that length of time?

A. Well, any place around the grounds where it was necessary.

Q. Do you know of any place that any repair was actually done other than as you have said between the power house and the bath houses?

A. Well, not particular.

Q. Then would it be your testimony, Mr. Mose-

(Testimony of Fred Ross Moseley.)

ley, that with the exception of the untangling of wires or some minor repairs to the system between the power house and bath houses, the rest [472] of the system was in the same condition from the time Mr. Harmer last repaired it to the time of the fire? A. Approximately, yes.

Mr. Vargas: That's all, thank you.

Cross-Examination

By Mr. Parry:

Q. Was the system working satisfactorily the night before the fire? A. Absolutely.

Q. No trouble or anything around there?

A. No.

Q. All appliances and lights working good?

A. All working.

Q. Was it working all right that morning, the morning of the fire? A. Yes, sir.

Q. Did you see any trouble with any of the electrical devices of any kind there? A. No.

Mr. Parry: That's all.

Re-Direct Examination

By Mr. Vargas:

Q. I take it, Mr. Moseley, the electric system was being used then on the morning of this fire?

A. Not the lighting system particularly. The electric refrigerator was going. [473]

Q. So this power system was being used on the morning of the fire?

A. Sure, used all the time.

Mr. Vargas: That's all. I will recall Mr. Harmer.

MR. HARMER

having been previously sworn, testified as follows:

Re-Direct Examination

By Mr. Vargas:

Q. Now, Mr. Harmer, you testified that you had been requested to effect some repairs to the electric wiring system at Mineral Hot Springs a month or two months prior to the time Mr. Herzinger took it over?

A. That is right.

Q. Do you recall who made the request that you do that work?

A. There was an electrician out of Elko that had done some work at the U. C. Land and Cattle Company and Mr. Brown wanted him to do the work for him and I had helped him wire the State houses, so he asked Mr. Brown why he didn't get me to do it because he didn't have time.

Q. Then it was Mr. Brown who requested you to do the work, is that right? A. Yes.

Q. Now in the vicinity of what portion of these premises did you do that last repair job, the vicinity of what buildings? A. Well, he had some——

Q. Just answer the question—in the vicinity of what buildings [474] was the work done?

A. In around the oil house, a corner of what the bar room is and the canopy.

Q. Now at that time will you describe to the ladies and gentlemen of the jury and to the Court

(Testimony of Francis Harmer.)
the condition of the electric wiring in and about the canopy?

Mr. Parry: Again we object, if your Honor please, as too remote and attempt to impeach their own witness. They have called as their witness Mr. Moseley who testified at the time of the fire the wire was in good order.

Mr. Vargas: Oh, if the Court please——

The Court: The objection will be sustained upon the first ground, it is too remote.

Mr. Vargas: That is all.

Mr. Parry: No further questions.

Mr. Vargas: I would like to make an offer of proof if permitted to.

The Court: We can do it some other time.

Mr. Vargas: It may be understood that I may make my offer of proof at some other time?

The Court: Yes, if you remind the Court.

E. A. ODERMATT

having been previously sworn, testified as follows:

Direct Examination

By Mr. Vargas:

Q. Will you state your name? [475]

A. Ernest J. Odermatt.

Q. You have been previously sworn to testify in this case, have you not? A. Yes, sir.

Q. You are one of the defendants?

A. Yes, sir.

Q. Referring to the 3rd day of May, 1947, the

(Testimony of E. A. Odermatt.)

day of the fire involved here, are you familiar with the truck that was used by Mr. Nielson on that day?

A. Yes, sir.

Q. Are you familiar with the mechanical condition of that truck as of May 3, 1947?

A. Yes, sir.

Q. Will you please state to the ladies and gentlemen of the jury and to the Court what the mechanical condition of that truck was on that date, generally?

A. Generally the mechanical condition of that truck was in perfect condition.

Q. Will you state whether or not that there had been, prior to that time, any work, replacements or anything of that character on or in connection with that truck?

A. Somewhere approximately about the first of the year of 1947 that truck was overhauled from the front clear through the back. It had new motor, new transmission, new rear end, and had been completely rebuilt. [476]

Q. Were you at the premises known as Mineral Hot Springs on the day of the fire, Mr. Odermatt?

A. Yes, sir.

Q. About what time did you get there?

A. Well, as near as I can remember, it would be from 4:00 to 4:30, right in that vicinity.

Q. In the afternoon? A. That's right.

Q. Who, if any one, accompanied you to Mineral Hot Springs? A. Lee Nielson.

Q. Where did you and Mr. Nielson leave on that

(Testimony of E. A. Odermatt.)

journey, what point did you depart from to go to Mineral Hot Springs?

A. From Wells, Nevada.

Q. Did you have occasion to observe the physical condition of Lee Nielson at Wells, Nevada?

A. Yes, sir.

Q. Will you state for the ladies and gentlemen of the jury what his condition was with reference to whether or not he had any injuries?

A. Lee was slightly burned about the hands and his face was quite red, his eyelashes were singed, his hair was singed somewhat. I made it a personal point to see that Lee was not seriously injured because he wanted to return to the scene of the fire with me and for that reason I made sure that he was OK before we left. [477]

Q. He did return to the scene of the fire with you? A. That is right.

Q. Will you state whether or not Mr. Nielson went on working the next day? A. Yes, sir.

Q. Now when you got out to Mineral Hot Springs at 4:00 or 4:30 on the afternoon of May 3, 1947, did you see Mr. Herzinger there when you arrived?

A. No, sir, Mr. Herzinger wasn't there.

Q. He came up later? A. Yes.

Q. Did you have occasion to have a conversation with Mr. Herzinger that afternoon or evening?

A. Yes, I did.

Q. Where did that conversation occur?

A. I first attempted to have a conversation with

(Testimony of E. A. Odermatt.)

Mr. Herzinger when he drove up and stopped in front, well, I guess it was what would have been the old bar room, and there were quite a few people gathered around there and he stopped and everybody moved up to where he was, so I didn't have any conversation. I didn't speak to him at that time.

Q. Now the conversation you had with him was after his original appearance on the scene?

A. That's right.

Q. Where did that conversation take place?[478]

A. The conversation took place down in a building, well, it was a wooden structure just about straight east from the old bar building.

Q. Who was present at that conversation?

A. Mr. Nielson was with me at the time.

Q. Do you recall if any one beside Mr. Herzinger, Mr. Nielson and yourself were present?

A. Mr. Moseley was in the building at the time.

Q. What, if anything, was said as between yourself and Mr. Herzinger and Mr. Nielson at that time?

A. Well, I asked Mr. Herzinger at that time if he had any idea about rebuilding or his plans or anything and he said, "No, I don't have any idea what I will do." I said, "Well, if you think that you are interested in having new equipment, as far as gasoline equipment"—I asked Mr. Herzinger if he was interested in having new gasoline equipment installed and he said, "Oh, I don't know." I said, "Well, any way I am going to report the fire to Mr. Warner if I can get hold of him, as soon as I get back and if he is available we will be up to see

(Testimony of E. A. Odermatt.)

you in the morning," and he said, "All right." That ended that part of the conversation. I told him the hose ends have filling spouts and also one cap was open on the tank, that I would like to screw down with his permission and he said, "I don't care what you do," and with that in mind I went up and wired the fastening inside the cap shut and wired it and removed the [479] spout from the outside and this coil of wire that he has referred to here before answers two purposes, one, it keeps the hose from kinks, second, acts as a binding cable between the truck and the delivery tank during the time you are making your delivery. That is fastened through a friction cap on the machine to each end of the hose fitting. I removed that and the hose ends and this filler pipe that was in the spout and Mr. Nielson was with me and I handed him those ends. Then I proceeded to seal the cap shut on that outside tank. The coil wire, I didn't take it over and throw it into the basement of the bar. I took it over and laid it in the other corner at the front end of the bar, so if I wanted it later on I would know where to find it, and that wire wasn't in the position at the time I left there that the picture shows.

Q. You refer to the picture of the wire?

A. That's right.

Q. Are you still using those fittings?

A. Yes, sir.

Q. That is the fitting that attaches the hose to the tank of the truck? A. That is right.

Q. And the nozzle fittings?

(Testimony of E. A. Odermatt.)

A. That is right.

Q. Where was this hose lying with reference to the gasoline pumps when you first observed it? [480]

A. The hose was lying with the filling spout of the hose in the filler pipe of the tank, lying parallel with the pump block, with the end of the hose, or tank end, coupling end, to the south.

Q. In other words, the hose was in line with the nozzle in the filler tank and then parallel with the island on which the gas pump is located?

A. That is right.

Q. And the end of the hose that connected it with the truck was to the south? A. That is right.

Q. Did you see your truck that day?

A. Yes, sir.

Q. Where did you see your truck?

A. The truck was parked—at the time I got there the truck was on the road that leads down to this tent house that they have referred to somewhere in this testimony. It was off the highway, setting there.

Q. Was it ever moved from that point?

A. Yes, sir.

Q. Do you know who moved it?

A. Yes, sir.

Q. Who? A. Lee Nielson.

Q. Were you present when he moved it? [481]

A. Yes.

Q. How was it moved?

A. It was moved under its own power from that point to the highway maintenance station.

(Testimony of E. A. Odermatt.)

Q. Do you know whether or not at that time there were any fuel gasoline tanks on the truck?

A. Yes, sir.

Q. Was that gasoline which was in the tank or tanks at that time later disposed of?

A. Yes, sir.

Q. How was it disposed of?

A. The gasoline was delivered to the State Highway Department.

Q. Now was there also some icebox oil or something like that?

A. There was some ice machine oil on the back. I think that is the product that Lee had reference to as caloil. It is ice machine oil which is used in a hydraulic hoist that we were taking to the State Highway Department.

Q. Was that particular department delivered that later?

Q. We had two cans on there. For some reason somebody had taken one can off the back of the truck and dumped it in the brush. The can was still there. We picked up the can and took it back to our plant for the purpose of holding it for our auditor so he would know—and the other can was there.

Q. Where was that one that was near the truck?

A. The can in the brush? [482]

Q. Yes. A. It was right close.

Q. And the other can you say the product was delivered to the State Highway Department?

A. That is right.

(Testimony of E. A. Odermatt.)

Q. Will you describe to the ladies and gentlemen of the jury and to the Court the condition of your truck when you first observed it after the fire?

A. Yes, sir. The top back of the cab and on the right-hand side, just a little ways forward, was blistered. The paint on the top of the tank, most of it was burned off. The paint on the left-hand side of the truck, the driver's side, was scorched and burned, I would say maybe that far.

Q. "That far" doesn't indicate anything in the record. What do you say in inches?

A. I would say probably six or seven inches.

Q. That is on the left-hand side?

A. That is right. Then on the right-hand side this pumping unit that we have referred to, we had a suction hose that laid along the side of the truck, that was connected to each one of these five nozzles in the event that we were pumping fuel oil, that hose was burned off.

Q. Right at that point, Mr. Odermatt, I will ask you to take a look at Plaintiff's Exhibits 27 and 28.

A. Yes, sir. [483]

Q. And ask you whether or not there is anything appearing in those pictures with reference to the hose you just mentioned, the suction hose?

A. Yes, in this particular picture here——

Q. Now referring to exhibit 28?

A. Yes—was the suction hose. It wasn't completely burned but the outside casing was burned on that hose, as you can see there. That hose went up this pipe, goes down into the box that contains this

(Testimony of E. A. Odermatt.)

meter and hose and what have you, and I think if you look at that picture you will see the hose attached to that end.

Q. So that portion of the hose which appears as being at least partially destroyed in Plaintiff's Exhibit 28, was lying out along the right side of the top of the bed of the truck?

A. That is right. A portion of what on these exhibits here were the faucets is connected to each compartment of the truck.

Q. Now what kind of lights did this truck have on it, if any?

A. You mean in the way of road lights?

Q. Yes, headlights, tail lights, side lights.

A. Yes, the truck was completely equipped.

Q. Well, describe to me what lights it had on it.

A. It had running or clearance lights and tail lights, headlights, parking lights.

Q. You say it had clearance lights. Where were they?

A. They were on the outside edge of the bed. [484]

Q. From both sides?

A. They were exposed through openings to the front of the bed underneath the bed and to the back the same way, through the side of the bed. There were four lights beside the tail lights.

Q. Four clearance lights? A. Yes, sir.

Q. One of them was under the front corner of the bed on either side? A. That is right.

(Testimony of E. A. Odermatt.)

Q. And the other two were under the rear corner of the bed on either side, is that right?

A. Yes. The tail light was on the driver's side, fastened on the frame.

Q. Where did the wires run that serviced these clearance lights?

A. They run along underneath the bed of the truck.

Q. Were they exposed wires? Were they imbedded in the bed or how were they put there?

A. They were wires which ran—I don't know the exact name of it, but it is a regular wiring loop that these automotive supply houses furnish for that type of wiring.

Q. And the truck had a tail light?

A. That is right.

Q. And a pair of headlights?

A. That's right. [485]

Q. After this fire will you state whether or not all those lights operated? A. Yes, sir.

Q. They all operated? A. Yes, sir.

Q. After you delivered the gasoline out of the truck to Mr. Harmer, to the Nevada State Highway Department, what, if anything, was done with the truck?

A. Then the truck was returned to Wells.

Q. How? A. Under its own power.

Mr. Vargas: That's all.

The Court: Mr. Platt, have you any questions?

Mr. Platt: It has been suggested, your Honor

(Testimony of E. A. Odermatt.)

please, that I interrogate the witness along certain lines, but my recollection is he has already testified as to them.

Q. (By Mr. Platt): May I inquire, Mr. Odermatt, as I understand, did you remove, with assistance, the gasoline remaining in the tanks?

A. Yes.

Q. And when you appeared on the witness stand before, as I recall, did you testify the quantity of gasoline you removed? A. Yes, sir.

Q. And your pumping it?

A. Yes, sir. [486]

Q. And all the incidents connected with it?

A. Yes, sir.

Mr. Platt: That's my recollection.

Mr. Wilson: We don't care to cross-examine the witness.

WILLIAM WARNER

a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Vargas:

Q. Will you state your name please?

A. William Warner.

Q. Where do you reside? A. Ely.

Q. What is your business or occupation?

A. Manager Standard Oil for the eastern part of Nevada.

Q. About how long have you held that position?

(Testimony of William Warner.)

A. Five years July of this year.

Q. Directing your attention to May, 1947, you then held that position with Standard Oil?

A. That is correct.

Q. Where were you living at that time, May, 1947? A. Ely, Nevada.

Q. Have you ever been to the premises or locality known as the Mineral Hot Springs?

A. I have. [487]

Q. I will ask you whether or not you were there in May of 1947? A. Yes.

Q. With reference to the fire, which is the subject of this action, having occurred on May 3, 1947, were you there shortly after the fire?

A. I was there the next morning.

Q. The morning following the fire?

A. Yes, sir.

Q. Did any one accompany you on that occasion?

A. Mr. Odermatt.

Q. Where did you and Mr. Odermatt come from prior to your arrival at Mineral Hot Springs?

A. From Wells.

Q. About what time did you arrive at Mineral Hot Springs?

A. It was around ten o'clock, between nine and ten.

Q. Who, if any one, was present or around Mineral Hot Springs when you and Mr. Odermatt arrived out there?

A. When we arrived at the scene of the fire the only person near there was a man by the name of

(Testimony of William Warner.)

Mr. Hack, Bill. Mr. Odermatt introduced me to him and he was the only person close to the fire.

Q. Did you see Mr. Moseley there?

A. I saw Mr. Moseley that morning.

Q. Was that after your arrival he appeared on the scene? [488]

A. After looking over the scene of the fire and discussing the thing with Mr. Odermatt and Mr. Hack, I suggested we go down and see if we could find Mr. Herzinger and Mr. Moseley. At that time Mr. Hack said, "I don't believe Mr. Herzinger——

Mr. Parry: We object to testimony which is pure hearsay.

Q. Mr. Warner, you say some time after your original appearance at Mineral Hot Springs you saw Mr. Moseley? A. I did, yes, sir.

Q. Do you know whether or not there was any type of refrigerator unit in what had been the grocery store of these premises? A. Yes, sir.

Q. Had you, prior to this fire, seen any type of refrigerator used in the grocery store?

A. No, I had not. I hadn't noticed.

Q. You first observed it after the fire?

A. I observed it that morning for the first time.

Q. Now were you at any time in the immediate vicinity of this refrigeration unit in company of Mr. Moseley? A. No.

Q. Can you relate to the ladies and gentlemen of the jury and to the Court what, if anything, you observed with reference to this refrigeration unit? What did you see in or about it?

(Testimony of William Warner.)

A. Well—that was the morning after the fire?

Q. Yes. [489]

Mr. Parry: Objected to as immaterial.

The Court: Objection overruled. Answer the question.

A. I noticed as we walked around, we looked at this particular icebox which I identified immediately as being a kerosene ice box, the door was ajar and we felt we better have a look inside to see if it was in use, and it looked like cooked meat in the back of it, what kind I couldn't tell.

Q. Where was that kerosene refrigerator located at the time you examined it?

A. Right next to the door as you entered the same on the left-hand side.

Q. Now I show you Plaintiff's Exhibit 18 and ask you whether or not there is any article portrayed in that exhibit which may be that kerosene refrigerator, which may be?

A. It could be these portions here.

Q. Would you please indicate that part on the photograph by drawing an arrow above it pointing down to it? (Witness complies.)

Mr. Vargas: That is all, if the Court please.

Direct Examination

By Mr. Platt:

Q. Mr. Warner, upon that occasion, the 4th day of May, 1947, when you visited the Hot Springs property you just testified to, did you have a conversation with Mr. Moseley and Mr. Hack at any

(Testimony of William Warner.)

time during that visit? [490] A. I did.

Q. Do you remember about when and where that conversation took place?

A. The conversation with Mr. Hack was at the ruins of the building, of the fire, and the conversation with Mr. Moseley was down at the new location of the bar.

Q. Do you know, of your own knowledge, whether or not Mr. Hack was an employee of Mr. Herzinger? A. Mr. Hack——

Mr. Parry: The question should be answered yes or no.

Q. I just wanted to know if you had the knowledge whether he was an employee of Mr. Herzinger or not. A. In my mind, yes.

Mr. Parry: I ask the answer be stricken.

The Court: It may go out. Can you answer that question yes or no?

A. I was only giving you the information given me that morning of the conversation.

Q. I want to know, did Mr. Hack inform you when you saw him where he was employed, if at all?

Mr. Parry: Object to that as self-serving.

The Court: Objection will be sustained.

Q. Where did you say you had a conversation with Mr. Moseley?

A. It was in the building just east of the ruins of the fire and Mr. Moseley had installed a sort of store room, temporary [491] bar, and that's where we had our discussion.

Q. I wish you would state what that conversa-

(Testimony of William Warner.)

tion was, as nearly as you remember, what you said and what Mr. Moseley said. I wouldn't expect the exact words, but substantially what you said.

A. I told Mr. Odermatt I wanted to go down——

Mr. Parry: That is objected to——

The Court: It may go out.

Q. I just wanted to get the conversation you had with Mr. Moseley.

A. Mr. Moseley was at the bar there and I greeted him, told him I was sorry to hear of the fire and I asked for Mr. Herzinger and he advised me he was in Idaho, and I said, "Well, Mr. Moseley," in a kidding way, "you are already in business at least" and he laughed about it and he said, "Yes, we are in business immediately after the fire, such as it is." So I asked Mr. Moseley, in the matter of conversation, if he knew in his mind what started the fire. He said he did not. And I also asked him if the kerosene ice box in the grocery store was being in use and he said it was necessary to put some cured meat in the ice box and that is practically all that was said. I was anxious to see Mr. Herzinger.

Q. Did you perform any services on that visit with Mr. Odermatt?

A. What do you mean by services? [492]

Q. Well, in order to direct your attention more rapidly, do you know, of your own knowledge, that Mr. Odermatt withdrew from the tanks, the underground tanks, the gasoline there in the tanks?

(Testimony of William Warner.)

Mr. Parry: I take it that is whether he saw it done or not. You can answer that yes or no.

A. What was the question?

(Question read.)

A. Mr. Odermatt asked me if it would be permissible——

Mr. Parry: Just a moment.

Mr. Platt: Just answer the question.

A. No, I did not see it.

Q. If any gasoline was withdrawn from the tanks, you did not see it withdrawn, is that true?

A. I didn't see it.

Mr. Platt: I think that is all.

(Short recess.)

3:15 P.M.

Presence of the jury stipulated.

Mr. Wilson: No cross-examination.

Mr. Platt: Your Honor please, I would like to call Mr. Herzinger for a question or two.

The Court: Yes, sir.

EDWARD HERZINGER

having been previously sworn, testified as follows: [493]

Direct Examination

By Mr. Platt:

Q. Mr. Herzinger, are you acquainted with a man by the name of Hack, whose name has come up here occasionally?

(Testimony of Edward Herzinger.)

A. I have seen him at times.

Q. How well do you know him?

A. Well, I have seen him a number of times.

Q. Has he ever been employed by you at your place? A. No, he hasn't.

Q. Has he ever performed any services for you at or about Hot Springs?

A. Well, that I couldn't say, not being down there all the time.

Q. Well, to your own knowledge, has he ever performed any services?

A. I have no recollection.

Q. I wish you would step to the blackboard, Mr. Herzinger, and point out, if you will, the location of any windows or doors in the basement.

A. There is only one door, that is there at the back.

Q. Will you mark that with a "V"? Will you tell us approximately the dimensions of that door?

A. You could drive in with a car, so I would say it could be eight or nine feet wide.

Q. How tall?

A. Oh, approximately six feet. [494]

Q. Now in addition to that door, were there any windows in the basement?

A. No, there were no windows in the basement.

Mr. Platt: That is all.

The Court: Any further examination of Mr. Herzinger?

Mr. Wilson: No.

Mr. Halley: I would like to recall Mr. Nielson.

LEE JAMES NIELSON

having been previously sworn, testified as follows:

Direct Examination

By Mr. Halley:

Q. Mr. Nielson, I show you Plaintiff's Exhibits Nos. 27 and 28, which have been identified here as pictures of the Odermatt truck. Do you recognize the pictures? A. Yes, I do.

Q. Now there is some white appearing substance on the edge of the body of the truck on those pictures, do you know what that is?

A. That is foam from the fire extinguisher.

Q. That is from the extinguisher you said you went back and picked up?

A. That I went back and picked up from the building.

Q. In what manner did you spray the foam on that particular side of the truck and on the edge thereof? A. Shall I explain?

Q. Yes. [495]

A. This truck is facing south and I came this direction, this way, and noticed that this hose you see here was afire and I used a little bit of foam on that, trying to put that fire out. Now I went around the truck and got up on top and used the foam and came back, which caused this white substance on the fenders and on the tires.

Q. Now there are some black marks on the tanks on Exhibit 27, could you tell us what they are?

A. Those black marks, that is smoke from this hose that was burning.

(Testimony of Lee James Nielson.)

Q. To your knowledge, was that smoke ever removed from there?

A. Yes, we washed the truck when we returned it to Wells.

Q. After you cleaned the truck and washed it, what marks were on it on the right side?

A. Right along the edge here is a steel rail and that paint on that was blistered a little bit. The paint above the door here was blistered some and a little just above where the hose was was blistered a little.

Q. On the tank? A. On the tank, yes.

Q. This white stuff on the fender of Exhibit 27, was that washed off?

A. Yes, that came from the hose, the high pressure hose, the extinguisher.

Q. You notice the picture of the right rear tire? [496]

Q. What exhibit is that? A. No. 28.

Q. Do you know whether or not that tire was continued in use after May 3rd?

A. It was. We continued to use that tire.

Q. For how long a period?

A. It was quite a while, I don't recall the length of time, but for quite a while.

Q. Well, it was used until what point?

A. Until we had to get a recap or it was worn.

Q. Until it wore out? A. That is right.

Mr. Halley: That is all.

(Testimony of Lee James Nielson.)

Cross-Examination

By Mr. Parry:

Q. Calling your attention to Plaintiff's Exhibit No. 28, you notice certain substance on the tire there? A. Yes, this tire here?

Q. Yes. A. Yes, I do.

Q. Had that truck been driven before these pictures were taken, do you know, between the time of the fire——

Mr. Halley: He doesn't know when the pictures were taken.

A. Not for certain. It could have been taken at the time I [497] went to Ely after the fire.

Q. Did you drive the truck after the fire?

A. That evening yes, I drove it back to the State Highway.

Q. And it had been down on a side dirt road?

A. It was a solid dirt road.

Q. But it was a dirt road? A. Yes.

Q. Then you drove it on that dirt road back up on the pavement and then a mile and a half down to the Highway station? A. Right.

Q. There were some scorched and burned places on that tire on the outside?

A. Not that I recall.

Q. Would you say there were not?

A. No, there were not.

Q. What is your answer, yes or no?

A. There were not.

Q. And there were scorched and burned places on the right side of the truck, were there not?

(Testimony of Lee James Nielson.)

A. On the tanks?

Q. Yes. A. Yes.

Q. And down on that receptacle where the rail runs was paint that was scorched and burned?

A. Underneath that part? [498]

Q. Yes. A. No.

Q. You say there were none down there at all?

A. None down there at all.

Mr. Parry: That's all.

ROSS FRED MOSELEY

was recalled and testified as follows on

Direct Examination

By Mr. Platt:

Q. Mr. Moseley, it has been mentioned, during the course of evidence, a man by the name of Hack. do you know Mr. Hack? A. Yes, sir.

Q. How long have you known him?

A. Oh, about ten years.

Q. How long? A. Possibly ten years.

Q. Was he employed in and about Mr. Herzinger's place at Hot Springs? A. No, sir.

Q. Do you know whether he ever performed any services about the place? A. He never did.

Q. He did nothing in the way of services around the place? A. No.

Q. Do you know whether he was at Hot Springs at the time the fire occured? [499]

A. He was on the premises.

Q. Where on the premises did you last see him?

(Testimony of Ross Fred Moseley.)

A. Well, I don't know. He was all over the place at various times.

Q. Well, did you ever see him in the bar room?

A. Yes, sir.

Q. Was he in the bar room at the time the fire occurred? A. Not to my recollection.

Q. To the best of your recollection, where in the building was he? A. I couldn't say.

Q. Are you sure he was in the premises within one of the buildings?

A. Well, he was on the premises.

Q. How do you know he was on the premises?

A. Well, he usually was.

Q. He usually was. Did you hear him make any declaration or statement about the flash while he was sitting within the premises? A. No, sir.

Q. Are you sure about that? A. Yes, sir.

Q. Where is he now? A. I couldn't say.

Q. When did you see him last? [500]

A. Oh, possibly two months ago.

Q. Did you see him the day of the fire?

A. He was on the premises the day of the fire.

Q. When did you see him and where, if at all, right after the fire?

A. Well, he was various places around the premises.

Q. As I understand it, after the fire you saw him at various places in and about the premises?

A. That's right.

Q. For how long a time after the fire did you see him in or about the premises?

(Testimony of Ross Fred Moseley.)

A. Oh, he had a cabin there, he was around there possibly a couple of weeks.

Q. Did he live in this cabin?

A. He stayed there.

Q. How long did he stay there?

Mr. Parry: I object; it has been asked and answered. He said about two weeks after the fire.

Mr. Platt: No, I didn't ask that question.

The Court: He may answer the question.

Q. How long did he stay or live in that cabin?

A. From the time he came until the time he left?

Q. Yes.

A. Well, about six weeks, maybe two months.

Q. And you don't know where he is now? [501]

A. No, I wouldn't be in a position to say where he is located.

Q. Have you tried to locate him since the fire?

A. No.

Mr. Parry: Object as immaterial.

The Court: It is already answered.

Mr. Platt: That's all your Honor.

The Court: Any further questions?

Direct Examination

By Mr. Halley:

Q. While Mr. Hack was there for a period of six weeks to two months, Mr. Moseley, what sort of work was he doing?

A. Not anything particularly.

Q. He didn't have a job or position?

A. No, sir.

(Testimony of Ross Fred Moseley.)

Q. Did he from time to time help you clean the place up, now and then?

A. Sometimes he would sweep the floor.

Q. How often would he do that?

A. Not very often.

Q. Well, about how often?

A. Every time you asked him to, if he was in the mood.

Q. How often would you ask him to?

A. Not very often.

Q. What is your best recollection on it, Mr. Moseley?

A. Well, I don't know as I can tell you. [502]

Q. Would that be once a day?

A. I wouldn't say so.

Q. Would it be about every other day?

A. Well, maybe once a week.

Q. Well now would that be the floor of the bar and the grocery store?

A. Well, it might be either one.

Q. Would he ever clean out any of the cabins for you? A. No.

Q. What consideration did you give him for sweeping the floor?

A. Well, he had the cabin there and place to stay.

Direct Examination

By Mr. Platt:

Q. May I inquire, Mr. Moseley, if he paid any rent for the cabin? A. No, sir.

(Testimony of Ross Fred Moseley.)

Q. He had the cabin rent free?

A. That's right.

Q. And who owned the cabin?

A. Mr. Herzinger?

Q. Of course, you kept the books?

A. Beg pardon?

Q. You kept the books of the concern?

A. Yes, sir.

Q. You were the business manager in Mr. Herzinger's absence [503] at least? A. Yes, sir.

Q. And you know he never paid any rent for the cabin? A. Never did.

Mr. Platt: That's all. If your Honor please, I think I can make this statement in the presence of the jury. I do not want to delay the proceedings, neither do I want to anticipate your Honor's rulings, but if we have made sufficient of a showing that Mr. Hack was identified sufficiently with the Hot Springs, we would like to call Mr. Odermatt to testify as to a conversation they had.

The Court: I would say you have not made sufficient showing at this time.

Mr. Halley: I think through Mr. Odermatt we can make a further showing as to Mr. Hack's connection with the place.

The Court: The ruling will stand. The anticipated ruling wouldn't be changed under that set of circumstances. However, I will listen to what Mr. Odermatt has to say.

E. J. ODERMATT

was recalled, and having been previously sworn, testified as follows:

Direct Examination

By Mr. Halley:

Q. Are you acquainted with Mr. Hack, Mr. Odermatt? A. I am. [504]

Q. How long have you known Mr. Hack?

A. Oh, I have seen Mr. Hack in and around Contact for several years.

Q. At what places did you see him in Contact?

A. I had seen him at Mr. Herzinger's and at Mr. King's, both.

Q. And over what period of time did you see him at Mr. Herzinger's?

A. Well, right at the time of the fire he had been around there for some time. I would just be at a loss to say, but I would say a few months.

Q. Prior to the fire? A. That's right.

Q. Did you observe what he was doing around there?

A. I have seen him service cars, fill gasoline in the tanks, take back cases of beer and fill the beer cart and sweep the floor and clean up around the grounds.

Q. How often did you see him work with the beer?

A. Well, as to how often, the only thing I have to offer there is that our trips would be sometimes once a week and sometimes twice a week in there, but during that period of time Mr. Hack was in and

(Testimony of E. J. Odermatt.)

around the premises.

Q. On each trip that you were there?

A. Yes, for a period of two or three months in there, both before the fire and for some two or three weeks after.

Q. On each of your trips did you observe him doing something [505] around the premises?

A. Yes. I wouldn't say just what, but he appeared to be an employee.

Mr. Parry: I object to this.

The Court: It may be stricken, go out.

Q. But on each trip you say you saw him doing something at the place?

Mr. Parry: Objected to as leading and repetitious.

The Court: It has been already answered.

Mr. Halley: We now submit, your Honor, Mr. Hack has been sufficiently identified with this enterprise. We would like to go into the conversation Mr. Odermatt had with Mr. Hack.

The Court: Of course, there is nothing before the Court now.

Q. Did you, following this fire, have any conversation with Mr. Hack? A. I did.

Q. Don't tell us what the conversation was, but where did you have the conversation, when, and who was present?

A. I had the conversation in front of the ruins of the grocery and bar in front of Mr. Warner.

Q. In Mr. Warner's presence?

A. That is right.

(Testimony of E. J. Odermatt.)

Q. And Mr. Hack? [506]

A. That is right.

Q. Was there anybody else present?

A. That's all.

Q. What conversation did you have with Mr. Hack concerning the kerosene refrigerator, if any?

Mr. Parry: We object as hearsay.

The Court: Objection will be sustained.

Mr. Halley: We would like to make offer of proof, your Honor, at the time we make our other offer of proof.

The Court: Of course, you may do so, but as I said to Mr. Vargas, you want to call my attention to it. Any further questions?

Mr. Halley: No further questions.

JACOB A. RYAN

a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Platt:

Q. Will you state your name, please?

A. Jacob A. Ryan.

Q. What is your occupation or profession?

A. I am a research engineer.

Q. Are you presently engaged in that vocation or occupation or profession? A. Yes, sir.

Q. To what scientific endeavor have you devoted your energies? [507]

A. Well, I began with graduation as a civil

(Testimony of Jacob A. Ryan.)

engineer from the University of Nebraska in 1910. I followed that work, construction, for ten years and in 1920 I went to work for the Standard Oil Company, construction work. I was there only for a few weeks and got into testing work. Testing is a very considerable job, very comprehensive work has to be carried out to see how processes are operating where there are temperatures, pressures, heat flows, vapors, and all such kind of problems.

Q. Do your endeavors include combustion?

A. Yes, and fire prevention and hazards. In the middle 1920's I supervised the conduction of a great many tests which were designed to learn how fires may be started, the flow of vapors, velocity, the composition of vapors that are involved in gasoline and other petroleum products, storage tanks, and all work of a similar nature. That work was carried on quite extensively for three to five years and during the next ten years there was occasionally work in answer to some particular question that would arise. Later that work practically ceased, but I was from time to time called on for consultation in connection with fire prevention and fire hazards.

Q. For how long a period of time, Mr. Ryan, have you been engaged in these professional activities?

A. Well, since 1920, when I first went to work for Standard Oil Company.

Q. Which would be approximately thirty years?

A. Yes.

(Testimony of Jacob A. Ryan.)

Q. What, briefly, are the essential elements of a fire? I mean just as briefly as you can.

A. Well, there must be a combustible material, there must be oxygen and a source of ignition.

Q. Those two elements are essential?

A. Three elements.

Q. Relying on your experience with gasoline and gasoline vapors, will you state whether, in your opinion, spontaneous combustion may arise from an outlet of gasoline or vapors?

A. Not at ordinary atmospheric temperatures.

Q. What essentially are the elements which produce spontaneous combustion?

A. Spontaneous combustion is caused by fairly rapid exhaustion of the combustible material. Such exhaustion will not come in some materials, such as loading oils or coal stacked in piles, at atmospheric temperatures. In addition to the rapid exhaustion which, of course, gives off heat, as all exhaustion of combustible material does, there must be some means to confine the heat, so that the whole mass, or portion of the mass, will be heated to the ignition temperature. Gasoline and gasoline vapors exhaust very slowly until the temperature is at least 500 degrees Fahrenheit, not below 500 degrees Fahr.

Q. Well, in the absence of spontaneous combustion properties of gasoline and gasoline vapors, the limitations that you [509] have expressed, how, from a scientific viewpoint, would it be possible

(Testimony of Jacob A. Ryan.)

to ignite gasoline or gasoline vapors? In other words, would it require some outside agency?

A. Definitely.

Q. In other words, as I understand it, in order to ignite gasoline or gasoline vapors, it would be necessary that an outside agency of fire come in contact with the vapor or the gasoline?

A. Well, heat in some form; we will say a flame or a spark or a hot surface.

Q. A hot surface? A. That's right.

Q. But outside of those three outside agencies, gasoline or the vapors would not ignite?

A. That is correct.

Q. Let me ask you, in your opinion would a spark of an electric motor ignite gasoline vapors?

A. Yes.

Q. Why is that?

A. Well, because it is releasing energy and it is arcing of the electric current between two points and electric arcs are very hot. It is the same principle that is used to ignite your gasoline mixture in your automobile and engine cylinder.

Q. In other words, it takes an electric spark to do it?

A. An electric spark is capable of igniting gasoline vapors. [510]

Q. Well, coming down concretely to this question, let me ask you if any open flame would ignite gasoline vapors, such as a pilot light or a kerosene lantern? A. Yes, it would.

Q. Why is that?

(Testimony of Jacob A. Ryan.)

A. Because it is hot. Even a small pilot flame, any flame that you can see, will have a temperature of probably 1600 to 1800 degrees, which is more than hot enough to ignite fuel.

Q. Well, as a matter of scientific knowledge, does gasoline as such burn?

A. Not as a liquid. It burns only in the vapor state.

Q. Suppose, for instance, I dropped a lighted match in gasoline and there were no emanating vapors, would the gasoline take fire?

A. It would be difficult to drop a lighted match into a channel of gasoline without going through a boundary of vapors which were in inflammable range. Immediately over the surface it would be too rich to burn, just as you drop it into a vacuum.

Q. In other words, if there weren't the surrounding vapors and you dropped a lighted match in the gasoline, the match would go out?

A. That's right.

Q. You are familiar with so-called vents on underground gasoline tanks? **[511]**

A. Yes.

Q. What is the purpose or the function of a vent?

A. Well, a vent is to allow the escape of the mixed air and gasoline vapors from the top of the tank. When you drop in liquid which will displace those vapors, if you do not have a vent, they would have to work back out of your fuel pipe along your nozzle.

(Testimony of Jacob A. Ryan.)

Q. I want to ask you now, Mr. Ryan, a so-called hypothetical question based, I hope, upon the evidence introduced in this case. Let us assume that a six-cylinder Ford truck, loaded with a thousand gallons of gasoline, also a Flamo cylinder, a few barrels of petroleum products, had travelled fifty miles up and down grade, using second gear at intervals, and assume further that in the course of this 50-mile journey the truck travelled a downward direction or grade and possibly at the end of the journey a two or three per cent elevation or grade for almost three-quarters of a mile; assume further that this truck arrived at its destination to deliver gasoline, that at the time of the delivery of the gasoline the motor of the truck was shut off; assume further that ten minutes elapsed and the truck was again started, backed from under the station canopy to move to a place outside of the pump block and the motor again turned off—I mean the motor of the truck—and twenty to twenty-five minutes more elapsed. State whether or not, in your opinion, the exhaust pipe of that truck, under the [512] conditions mentioned, could possibly have ignited gasoline vapor?

Mr. Parry: To which we object, if your Honor please, upon the ground that the question, as asked, does not correctly state all of the elements to be specified and fails to state some of the necessary elements to be taken into consideration and incorrectly states some of the facts assumed.

The Court: Can you point them out?

(Testimony of Jacob A. Ryan.)

Mr. Parry: One was the assumption was the last grade was about three-quarters of a mile. The testimony is a mile and a half.

Mr. Platt: If you say it is a mile and a half, I will concede that change.

Mr. Parry: I am not testifying, I am objecting. And it fails to insert evidence as to altitude, the temperature, the humidity, and many other elements that are necessary for the witness to express the reason.

Mr. Platt: Of course, your Honor please, there is no evidence here of humidity. There is some evidence of altitude. Should there be any question in the Court's mind——

The Court: To intelligently pass on that objection would require nearly as much expert knowledge as this witness is qualified to give. There is some evidence here in regard to the temperature, but there is no evidence here as to humidity. [513] Now it may be that these matters that are called to our attention by Mr. Parry, matters that are in evidence here, should be included in that question.

Mr. Platt: I submit, as I understand it, from a scientific viewpoint, the only real elements involved here are those elements of evidence I stated to the witness.

The Court: Didn't he say something about heat?

Mr. Platt: He spoke about contact of gasoline vapor to a heated surface.

The Court: Yes, well, we have some evidence

(Testimony of Jacob A. Ryan.)

here in the record of the heat prevailing that day.

Mr. Platt: Let me amplify that question by this statement: There has been some variation in the evidence with respect to heat, but assuming, Mr. Ryan, that the heat on that day was 90 degrees Fahr. I will include that in my question. Also assume that the altitude at Contact, as I recall the evidence, was 5300 feet; also assume any humidity or lack of humidity upon that day and time and occasion. I then ask you, taking into consideration these other elements, whether or not, in your opinion, the exhaust pipe of that truck, under the conditions I have mentioned, would ignite the gasoline vapor? A. No.

Q. Well, what is the reason for that opinion or conclusion?

Mr. Parry: We object to that as improper examination. [514]

The Court: I think the objection will be sustained.

Mr. Platt: Well, if your Honor please, I am quite willing to rely upon the answer of the witness, but it seems to me in fairness to your Honor and to counsel and to the jury——

The Court: I will withdraw the ruling. You may answer the question.

Q. What is the reason for your opinion?

A. Well, some of the items that Mr. Parry mentioned are of minor consequence. Humidity would be very slight consequence, we would say negligible. The effect of the atmospheric temperature would be

(Testimony of Jacob A. Ryan.)

of small moment. The temperature of the hottest part of the exhaust manifold, I think I am able to answer quite accurately.

Mr. Parry: We object to the witness patting himself on the back.

The Court: Objection will be overruled. Answer the question.

A. The gasoline engine normally delivers about 25 to 26 per cent of the energy that is introduced in the fuel to the crank shaft. That leaves, we will say, 73 or 74 per cent of the energy to the exhaust, the exhaust and cooling motor, and in proportion it is split practically 50-50 between the two. That means a little more than one-third of the heat energy that is going into fuel is dissipated in the exhaust. The [515] maximum temperature of gas is 1200 or 1300 degrees. Actually, no point in the exhaust pipe can get that hot because heat is constantly being dissipated by two routes, radiation and reflection. Radiation means that heat energy is transcribed through the air or surrounding atmosphere without being affected by this heat energy. It strikes the hood over the engine, which is heated up and the hood, in turn, loses its heat by reflection. Likewise, the air that passes around the engine through the radiator by means of a fan passes over the exhaust manifold and keeps a temperature difference between the maximum possible temperature of the gas, which we will say is 1200 to 1300 degrees, so as to lower the maximum fuel temperature probably 200 or 300 degrees. That is

(Testimony of Jacob A. Ryan.)

not strictly a conclusion, because I know something about the flow of heat and while the conditions are not ideal, so you can not make an exact computation, you can make an approximate one and I say it would be between 200 and 300 degrees lower than that exhaust gas entering the manifold. Additional computations show me it would take between 20 and 25 minutes for a truck standing at 90 degrees, the exhaust manifold to cool down to 500 degrees, which I have previously mentioned as the temperature below which gasoline content exhausts rapidly enough for spontaneous combustion, and which also is given in some of the insurance companies' manuals, such as the Fire Underwriters and Equitable Mutual Fire Insurance Company. They say gasoline [516] will ignite at 500 degrees, so if we cool the manifold to 500 degrees, we have brought it below the ignition temperature of gasoline. Now coming up a grade the motor would work harder and the temperature would go up and temperature cools very rapidly, more rapidly going down hill than it would standing idle, so that the condition at Contact, where one of these grades, the nearest one I believe, 19 miles from the station, would have been entirely eliminated. Drawing on my own judgment, it would not bring the temperature up more than 300 degrees at the most and that would soon be dissipated.

Q. Let me ask you this further hypothetical question. Assuming in this case that the truck in question was parked west of the pump block and

(Testimony of Jacob A. Ryan.)

close to it, some of the tanks being empty, some full—that is, the tanks on the truck; assume that a light southwesterly breeze was blowing toward the canopy under which there was an outlet or vent from the underground tank; assume further that within a few minutes prior there was put into one of the tanks 470 gallons of gasoline, that tank being a 530 gallon capacity; assume further that the truck was standing in the sun for about 25 minutes and there were discovered flames under the canopy. In your opinion, would these flames ignite the truck or the top of the truck, or how?

A. It would not ignite the truck.

Mr. Parry: That is objected to as a double question and again, I do not think all the elements are included. [517]

The Court: What elements are not included?

Mr. Parry: For the purpose of time, your Honor, I will withdraw that.

The Court: Objection overruled. Answer the question.

A. The vapor at the top of the truck would become ignited.

Q. The vapor on top of the truck?

A. The vapor at the top of the truck.

Q. Right there, in order that I may clarify things as we go along, explain, if you will, how there would be vapor on top of the truck.

A. Well, assume that the truck is standing in the sun. The sun, as we all know, is the source of all heat on the earth and the truck would be absorbing radiant heat from the sun at a rapid rate

(Testimony of Jacob A. Ryan.)

enough to warm up the contents of the truck to raise this vapor and cause additional evaporation of gasoline. That additional gasoline vapor would increase the pressure inside the truck tank and open the release valve, thereby permitting this vapor to flow out. We have assumed a breeze is blowing toward the canopy. That would carry this vapor in that direction. We have assumed a fire under the canopy. That would ignite that vapor, and the stream of vapor from the truck vent to the canopy would serve as a track for the flame to jump back to the truck bed and burn.

Q. Then as I understand it, what would be burning on top of the truck would be the gasoline vapor? [518] A. That is correct.

Q. Let me ask you this brief hypothetical question. Assume that the canopy that we just referred to extends from a building whose door is open, which is east of the canopy and the truck. Assume a light southwesterly breeze was blowing, and assume that the fill of the underground tank was not completed, or was just completed—not completed, was just completed—in your opinion, would any pilot light or moving operating motor or kerosene lantern in the building start a fire under those circumstances? A. It could very readily.

Q. Well, just explain briefly why.

A. Well, we have assumed a breeze first, we have just finished filling the tank, say 470 gallons——

The Court: I am a little in doubt about that,

(Testimony of Jacob A. Ryan.)

Mr. Platt. He is asked a hypothetical question and given his opinion. Now whether he should go any farther or not is a serious question. I am going to strike all he said in explanation of that last opinion and I am not going to permit him to answer this question.

Mr. Platt: Do I understand your Honor's ruling based upon a constituted fact——

The Court: I am not deciding the case, Mr. Platt. He has answered the question and that is it. We [519] are not going to let him go into any explanation. If counsel for the plaintiff wants to cross-examine, that is their privilege.

Mr. Platt: That is perfectly all right. I want to explain to your Honor the reason I asked the witness is simply for the enlightenment of those——

The Court: That is all, and all that answer given a while ago is stricken and the jury are instructed to disregard it.

Mr. Parry: I wonder if we could now move to strike from the record each and all questions which have been given as to reasons subsequent to the answer of your hypothetical question?

The Court: Yes, all answers will be stricken and the jury instructed to disregard or not consider any statements made by this witness in explanation of the opinions he has given here.

Mr. Platt: In other words, your Honor, so I may understand——

The Court: I think that is sufficient. I do not

(Testimony of Jacob A. Ryan.)

want anything more said in the presence of the jury by the defendant. That is sufficient.

Q. Well, here is another hypothetical question, and in accordance with the Court's ruling, Mr. Ryan, I ask you to just merely express your opinion without giving any reasons for [520] your opinion. Assume there is a hot water heater in the basement of these premises, with a pilot light, and the doors and windows placed as they appear on that blackboard——

A. (Interrupting): I am sorry, but I couldn't see the board when the witness was pointing out the doors and windows, so would you point them out to me?

Q. Well, assuming, as I understand Mr. Herzinger to testify, that there was a door at the east end of the basement, which I had him mark with a "V," this door being eight feet wide, I think, and six feet tall, and I am not sure about this, but I think he testified there was a window in this corner.

Mr. Parry: The testimony is no window.

Mr. Platt: All right, we will eliminate the window, but taking into consideration this door eight feet wide and six feet tall——

A. (Interrupting): That would be only a remote possibility.

Q. (Continuing): ——in your opinion, Mr. Ryan, if there was vapor being conducted on the interior of the building, could a match lighted by

(Testimony of Jacob A. Ryan.)

anybody in the building have exploded the vapor or caused it to take fire? A. Yes.

Q. In your opinion is the vapor inside a gasoline tank inflammable? A. No.

Q. I would like to ask you why, but I can't. There is some [521] testimony here as to bubbling up of the gasoline in an automobile tank that is being filled. Does such bubbling up occur in a gasoline tank or tanks in question here?

A. You mean below ground tanks?

Q. Yes.

A. Not unless the level is up inside the fuel pipe.

Q. That is the level of the gasoline?

A. The level of the gasoline comes up into the fuel pipe inside the nozzle.

Q. Then there would be bubbling?

A. That is right.

Q. Otherwise there wouldn't be?

A. No. I might add a plugged vent pipe might cause that.

Q. Well, assuming that at the time of this fire it was a still day and there was little or no breeze and the temperature was from 80 to 90 degrees. Under those conditions could vapor be carried from under a canopy to a store building behind it?

Mr. Parry: We object to that as an incomplete question and representation; an indirect way to bring out reasons.

The Court: You may answer the question.

A. Yes. I might add that there is no such thing as a day when there is no movement of air, particularly around buildings.

(Testimony of Jacob A. Ryan.)

Q. Who are your present employers? [522]

A. California Research Corporation.

Q. What is their function or their business?

A. They do research work and all kinds of technical work for the Standard Oil Company, of whom they are subsidiaries.

Q. How long have you been employed by this research company? A. Since May 1, 1944.

Q. It has been suggested that I ask you this question. You gave some testimony with respect to the ignition of gasoline vapors by contact with hot surfaces. How hot would such a surface have to be before there would become fire or flame?

A. Well, authorities differ on that. As I mentioned, the Equitable Fire Insurance Company puts out a manual, stating that any surface over 500 degrees shall be considered sufficiently hot to ignite gasoline vapors. The vapors in question are not the whole gasoline; they are the lighter contents of gasoline and have much higher ignition temperatures, from 850 to 1050.

Mr. Platt: That is all.

The Court: Have counsel for Mr. Odermatt any questions?

Mr. Vargas: No.

Cross-Examination

By Mr. Parry:

Q. I take it, Mr. Ryan, you would agree the amount of heat in the manifold and exhaust and internal combustion engine varies with many factors in the operation of that engine?

(Testimony of Jacob A. Ryan.)

A. Primarily with the load. [523]

Q. And also varies as to efficiency with which the engine was working? A. Yes.

Q. In other words, certain factors will affect heat? A. That is right.

Q. And the variables under which an engine will heat are many? A. Right.

Q. So in expressing an opinion as to the degree of heat that has been generated by any internal combustion engine operated under a load for an hour or more, there could be any number of variances? A. Yes.

Q. And under some of those variables that might become quite high?

A. I do not think higher than I mentioned.

Q. You say that is the top ceiling?

A. Yes.

Q. I wonder if you would agree with this statement in the Sales Operating Manual of your employer, the Standard Oil Company, in discussing these three elements of fire that you have mentioned, first it states that open flames will ignite vapor-air mixture and then it goes on: "Other sources of ignition not so apparent are: static electricity, stray currents from defective electric wiring, back fire, ignition spark, or hot [524] exhaust pipe of motor vehicles; * * *." Would you agree with that? Just answer the question. A. Yes.

Q. I would also ask you if you agree with this statement: reading from the same manual—"Gasoline vapors are three times heavier than air." Is that correct or incorrect? A. Incorrect.

(Testimony of Jacob A. Ryan.)

Q. Are they lighter or heavier?

A. Well, there are all kinds of gasoline. I would have to qualify that.

Q. I am talking about gasoline vapor.

A. Vapors vary.

Q. Then you would say the Sales Manual is not correct? A. It is a general statement.

Q. Is is generally true?

A. No, it is not generally true.

Q. Well, how much of the time is it true?

A. From my knowledge I would say it is seldom true.

Q. What kind of gasoline was being delivered up there at Mineral Hot Springs that day?

A. Just what do you mean?

Q. You said these varied with the kinds of gasoline. Now I want you to tell me what kind was being delivered?

A. Well, the gasoline that was being delivered up there, I would guess—not a guess, I know—was our regular product, the [525] weight of 115 and air weighs 29 and 29 goes into 115 nearly four times, which makes the whole product nearly four times as heavy.

Q. So gasoline is four times heavier?

A. That goes to the subject of high densities which evaporate over the gasoline surface and are much lighter than the whole gasoline.

Q. What is your answer, is vapor that is given off from that lighter or heavier than air?

(Testimony of Jacob A. Ryan.)

A. Lighter than the figure 3½, but heavier than air.

Q. How many times heavier than air?

A. A little more than double.

Q. Now any surface of gasoline that is exposed to this atmosphere, that is air, definitely gives off vapor, does it?

A. Any surface that vapors are carried away from, the surface can't become supersaturated.

Q. But that takes quite a saturation, this supersaturation?

A. Well, the gasoline has a developed pressure, which means there can only be a certain proportion of gasoline vapors in the air. If that proportion immediately above the surface is reached, evaporation ceases.

Q. And as I understand you, you say there is always a movement of air around buildings?

A. That is right.

Q. The range within which a mixture of gasoline vapors and air [526] will ignite is rather small?

A. Rather.

Q. It is quite a while since I looked this up, when there is a mixture of about 95 to 98 air and gasoline? A. Well, it is a little bit wider.

Q. OK, give it to us.

A. If high densities are considered, I figure 1.8 to 8.4 per cent gasoline vapor in air would be normal.

Q. Let us reduce that to percentage of air and gasoline over 100 per cent.

(Testimony of Jacob A. Ryan.)

A. That would be 91.6 to 98.2 per cent.

Q. But it is all in that limited range?

A. That is correct.

Q. And would this vapor pressure be affected differently, say (a) at sea level, and (b) at 5600 feet? A. Yes.

Q. In what way?

A. The vapor pressure of gasoline is constant. The atmosphere pressure varies with elevation.

Q. So atmosphere pressure would be less with a higher above sea level and be more vapor pressure?

A. That is right.

Q. Have you ever, in your experience, met up with any unexplained fires before?

A. No, I can't say that I have. [527]

Q. You have explained every fire——

A. I have not been out following fires. My work has been on research work, in developing heat and hazards and figuring up ways to reduce hazards.

Q. So then you wouldn't say every fire that has occurred in and around the use of gasoline has been explained?

A. Oh, I would not, by any means.

Q. And you are not here to tell the jury that you can explain this one? A. No.

Q. And isn't this correct, when you get these three elements together, that is the vapor and the explosive range, and what were those three you gave me, Mr. Ryan?

A. Combustible material, air, and source of ignition.

(Testimony of Jacob A. Ryan.)

Q. We had combustible material and oxygen there, so the question comes to the point of ignition. Now then a fire would have to start at the point of ignition? A. That is right.

Q. And then after the fire starts, it tends to follow this vapor trail of gasoline back to the source of the vapor, does it not? A. That is right.

Q. Metal, when once hot, tends to retain heat for a while? A. It loses quite rapidly.

Q. That is relative? [528]

A. No—well, relative to other products, yes. I might explain metals have very high radiation, which means that they lose heat rapidly and while they are heavy, they have low specific heats.

Q. We talk about the flash point of gasoline. What do we mean?

A. The flash point of gasoline means an arbitrary test that has been set up for the guidance of the vendors and buyers of petroleum products. It is determined in an apparatus in which a standard charge is placed and it is placed over a vat and heated over this vat, heating very uniformly, and at intervals, by temperature rises, a very fine gas flame is applied just above the surface of the liquid and the flash point is the point at which you just barely see that flame swell.

Q. And that means that the vapor is beginning to burn, is that correct?

A. That means that the vapor concentration just above the surface has reached the lower limit of inflammability.

(Testimony of Jacob A. Ryan.)

Q. And reading again from this same Sales Operating Manual, I find the statement: "Gasolines and other thinners have extremely low flash points and will vaporize at temperatures below zero degrees Fahr." Do you agree? A. I do.

Q. So we are dealing with a subject here that had a low flash [529] point? A. Very.

(Offer of proof regarding condition of electric wiring system made by Mr. Vargas; also offer of proof made by Mr. Halley regarding conversation by Mr. Odermatt with Mr. Hack. Offers rejected by the Court.)

(Recess taken at 4:30 p.m.)

Thursday, February 16, 1950, 10:00 A.M.

Presence of the jury stipulated.

JACOB A. RYAN

resumes the witness stand on further

Cross-Examination

By Mr. Parry:

Q. Mr. Ryan, I understood you to say there were certain release valves on top of these compartments, such as used here? A. That is right.

Q. Those operate when the pressure inside of the tank is greater than the atmospheric pressure outside, is that it? A. Right.

Q. And whenever there is a situation so that the atmospheric pressure is less than the pressure inside, the vapors come out of the tank?

(Testimony of Jacob A. Ryan.)

A. That is right.

Q. As I understand you, your work was more on the safety work than on fires?

A. That is correct. [530]

Q. And in the operations of the Standard Oil Company, of course, they have devoted a great deal of time in figuring out safety procedures?

A. Correct.

Q. And instructing every one connected with the company in that respect? A. Correct.

Q. I have been told in previous cases that in the case of a fire started from some source of ignition, it is the first few seconds that count, whether or not you can get it out. Would you agree with me on that? A. That is right.

Q. And that is why in the instruction book it is stated: "When deliveries are being made through tank truck hose, employee must stand at the tank truck faucet or nose nozzle valve until the delivery has been completed." You are familiar with that rule? A. Yes.

Q. And that is an accepted safety rule?

A. Yes.

Q. And this other rule: "During filling operations, either into underground storage tanks or at other containers, it is the employee's responsibility to determine that there are no sources of ignition present." You are familiar with that rule? [531]

A. Yes.

Q. And that is an accepted safety rule?

A. Yes.

(Testimony of Jacob A. Ryan.)

Q. Another part of the same rule: "During filling operations vapors are expelled around the fill pipe or the opening of the container. When making a bulk delivery, be on the lookout for the presence of any one smoking or carrying open lights or other sources of ignition. If necessary, cease the delivery operation until danger has passed." That is a sound safety rule? A. Right.

Q. And one that the company has adopted as a standard operation?

A. It appears in the manual, I believe.

Q. And another one: "Emergency hand extinguishing equipment is provided * * * used when needed." That is a standard safety rule when handling gasoline, isn't it?

A. It appears to be.

Q. And you agree with it?

A. I agree with it.

Q. In other words, their having an extinguisher is the test oftentimes whether you have a fire or not?

A. No, that extinguisher doesn't prevent a fire.

Q. I say if they have an extinguisher, it is the test often of a serious fire or not? [532]

A. It could be.

Q. Often is?

A. I couldn't say how often.

Mr. Parry: That is all.

(Testimony of Jacob A. Ryan.)

Redirect Examination

By Mr. Platt:

Q. Mr. Ryan, the cross-examination has suggested another question on redirect examination. From your hearing and observation of the testimony already offered in this case, is it your opinion that there was any outside agency at the time of the fire at or near the truck which caused the fire?

Mr. Parry: Objected to as not a proper hypothetical question by reference and not proper redirect. I did not go into that on cross-examination.

The Court: I think counsel asked permission to ask another question on direct.

Mr. Platt: I did say redirect, but I can call him on direct.

The Court: Objection overruled. Answer the question.

A. I saw no evidence indicating there was a source of ignition which the operator of the truck——

Mr. Parry: I object to that as invading the province of the jury.

The Court: It is not responsive. Read the question.

(Question read.) [533]

Mr. Parry: I renew my objection——

The Court: Objection will be sustained.

Q. As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?

Mr. Parry: Objected to as not stating facts upon

(Testimony of Jacob A. Ryan.)

which it is based. It must be a hypothetical question and it does not state any facts at all.

The Court. Objection will be overruled.

A. I can see no such possibility.

Q. Is there any difference between a so-called flash point and temperature that will cause gasoline vapors to ignite? A. None whatever.

Q. How do you distinguish between flash point and temperature?

A. Well, flash point is the temperature—you mean temperature of ignition?

Q. Yes.

A. The flash point is brought about by a flame which of itself is above the ignition temperature of the vapor, well above. Any flame, regardless how small, is above the ignition temperature of any petroleum vapor.

Mr. Platt: I think that is all.

Re-Cross-Examination

By Mr. Parry:

Q. What is the flash point of gasoline of the type used here?

A. Approximately 50 degrees Fahr. [534]

Mr. Parry: That is all, thank you.

Mr. Vargas: The defendant Odermatt has concluded his case in chief.

Mr. Platt: We have no further evidence, if the Court please.

The Court: Any rebuttal, gentlemen?

Rebuttal Testimony

EDWARD HERZINGER

having been previously sworn, testified as follows:

Direct Examination

By Mr. Daly:

Q. Mr. Herzinger, I don't know whether I asked you or not, who owned the underground tanks and the attachments at Mineral Hot Springs at the time of the fire?

A. The Standard Oil Company of California.

Q. Did you see the truck of Mr. Odermatt the day following the fire? A. Yes.

Q. Did you take some pictures of it?

A. Yes, I did.

Q. I wil hand you Plaintiff's Exhibits No. 27 and No. 28 and ask you if those are the pictures you took of the truck? A. They are.

Q. When were they taken?

A. You mean about the time of the day? The day after the fire [535] they were taken.

Q. About what time of day, if you remember?

A. Approximately about noon.

Q. Now referring to Exhibit No. 28, I will ask you what you saw on observing the truck, with reference to the tire, the top of which is shown at the bottom of that picture?

A. The tire was scorched from the fire.

Q. And can you show the jury where that is indicated on the picture?

A. Along the side of the tire, outside of the tire.

(Testimony of Edward Herzinger.)

Q. And what about this metal rim that is around the bed of the truck?

A. It here was all scorched too, the edge of the truck.

Q. Handing you Plaintiff's Exhibit No. 27, Mr. Herzinger, I will ask you to describe to the jury the condition of the truck and point out to the jury what you are talking about on that picture.

A. Well, beginning at the front end of the truck, this fender here was scorched and part of the door around the cab was scorched, part of this box to where that hose reels up, filling oil they use that for, some of it is scorched; also you can see the railing of the truck that goes around is scorched. You can still see the same tire scorch on the side and also the side of these tanks. [536]

Q. Did you look underneath the truck?

A. Yes, I did.

Q. What did you find there?

A. The truck was scorched directly up these dual tires in the back.

Q. Did you examine the other tires on the truck?

A. Yes.

Q. Did you find any of them to be scorched?

A. No.

Mr. Daly: That's all.

Cross-Examination

By Mr. Vargas:

Q. Did you take these pictures, Plaintiff's Exhibits 27 and 28? A. Yes.

(Testimony of Edward Herzinger.)

Q. When did you take them?

A. Oh, as near as I can recollect, about noon the day following the fire.

Q. Where was the truck located at the time you took them?

A. Down at the Highway Department, in their yard.

Q. Were you at Mineral Hot Springs about eight or nine o'clock on the morning following the fire?

A. Yes, I was.

Q. Did you see Mr. Odermatt and Warner there at that time?

A. No, I don't recollect seeing him there. [537]

Q. Did you remain over on the night of May 3, 1947, at Mineral Hot Springs? A. Yes, I did.

Q. You stayed there the next morning?

A. Until about nine o'clock, as near as I can tell.

Q. Where did you go at nine o'clock?

A. Over to the depot where Mr. Black is.

Q. Were you around there until noon?

A. I was back and forth between Mineral Hot Springs and Contact.

Q. Did Mr. Moseley, your general manager, advise you on the morning of May 4, 1947, that Mr. Odermatt and Mr. Warner had come to Mineral Hot Springs for the purpose of seeing you?

Mr. Daly: Objected to as improper cross-examination.

The Court: Overruled.

(Question read.)

(Testimony of Edward Herzinger.)

A. As near as I remember, he had told me they had been down there, but whether the day after the fire or not, I couldn't say.

Q. Did he also tell you at that time that he, Mr. Moseley, your general manager, had advised Mr. Odermatt and Mr. Warner that you had gone to Idaho? A. No.

Q. Who was with you when you took those pictures?

A. Del Hardy, the constable at Contact. [538]

Q. Any one else? A. No.

Q. This truck was there at the Highway Maintenance Station? A. Yes, it was.

Q. Did you see Mr. Francis Harmer there?

A. No, not that I recall.

Q. Did you make any particular effort to locate Mr. Harmer at the time you took the pictures?

A. No, I did not.

Q. Did you see any one around the State Highway Maintenance Station on the occasion of your taking these pictures?

A. No, only the party that was with me.

Q. I mean at the time you took the pictures?

A. No, I did not.

Q. That was about noon on May 4th?

A. To my best recollection it was.

Q. How many people are stationed at the Highway Maintenance Station near Contact, Nevada, if you know?

A. My recollection two are all.

Q. Who are they?

(Testimony of Edward Herzinger.)

A. Francis Harmer and E. Cox.

Q. You were there taking pictures about noon on May 4, 1947? A. Yes.

Q. You did not see those people?

A. No, I don't recall seeing either one of them.

Q. Now will you point out to me, Mr. Herzinger, where that tire was burned that you say was burned, so the jury can see it? A. Along the side wall.

Q. Are you indicating or inferring that portion which was burned, according to your testimony, is the portion which appears scorched or discolored in the photograph, Plaintiff's Exhibit No. 28?

A. Yes.

Q. In other words, it is your testimony that the white portion of the tire displayed there is an indication of burned rubber, is that right?

A. I wouldn't say exactly burned, but scorched.

Q. Well scorched to a high degree, any rubber falling off? A. No.

Q. Would you say slightly scorched?

A. Well, I would say it was scorched to the extent it didn't melt the rubber, not hot enough to melt any rubber.

Q. Did that burned or scorched rubber appear white in color?

A. Part of it was white. It seemed rather blotched.

Q. Was that a white side wall tire?

A. I just couldn't say.

Q. Well, you looked at it, didn't you?

A. Yes.

(Testimony of Edward Herzinger.)

Q. Took a picture of it? [540] A. Yes.

Q. But you don't remember?

A. I can't say now.

Q. Looking at Plaintiff's Exhibit 27, which apparently portrays the rear portion of the same truck and the same rear right tire, would your recollection be refreshed as to whether or not it is a black rubber tire or a white side wall tire?

A. That would be hard to tell, being it is black from smoke and stuff like that scorch.

Q. You wouldn't then have any recollection, nor could your recollection be reliable, as to whether or not those were black rubber tires or white side wall tires on that truck, is that correct?

A. No, I couldn't say as to the white side wall.

Q. Was the outside wall of this right rear tire of the truck scorched to the extent that the side rubber was bubbled at all?

A. There appeared to be just like small blisters, that's all. Very few of them.

Q. Very few of those? A. Yes.

Q. Would it be your testimony that the right rear tire on this truck had actually been on fire?

A. Well, I would say it was in a place.

Q. Then I take it, it would be your testimony that the condition [541] of this tire, as you observed it, could not have originated simply by reason of some heat in the immediate vicinity without fire being on it, is that right?

A. I didn't get your question.

(Question read.)

(Testimony of Edward Herzinger.)

A. You mean without any fire being on the tire?

Q. Yes. Maybe I can clarify that a little. You testified this right rear tire was scorched. Would you say that condition of the tire, as you observed it on May 4, 1947, could not have arisen simply by reason of there being some heat in the immediate vicinity of the tire?

A. There had to be heat there to scorch the tire.

Q. Without flame, I mean, on the tire?

A. It is possible to be a flame too.

Q. In other words, you couldn't tell, from your examination of this tire, whether the scorch damage to it originated from its being on fire or originated simply from there being some heat in the immediate vicinity?

A. The reason I know there has to be a flame is directly above these duals the bottom of the truck was scorched from fire.

Q. But you couldn't determine as to whether this tire had been on fire simply by observation of the condition of the fire itself?

A. It had to be afire. You can't get scorched without being [542] in fire.

Q. Well, do you testify, Mr. Herzinger, it is impossible for rubber to show any deterioration by application of heat in the immediate vicinity without the rubber being on fire?

A. There would be a deterioration but it couldn't be scorched.

Q. Now I believe you testified that the under portion, the bed of this truck, in the vicinity of the

(Testimony of Edward Herzinger.)

rear and between the dual wheels, showed evidence of burning? A. Above the dual wheels.

Q. Do you mean on the top or bottom of the rim?

A. Bottom of the bed, directly above.

Q. Was there a very appreciable burning, damage?

A. Well, not to any great extent. The wood was charred there.

Q. Did you by any chance take a picture from the rear of this truck?

A. I don't recall now if I did or not.

Q. Are these the only pictures of this truck you took, referring to Plaintiff's Exhibits 27 and 28?

A. Well, I couldn't say as to that, because all these pictures that were taken didn't always turn out and I had the best ones. Sometime we had light struck of the films.

Q. So you have no recollection now as to whether or not you may have taken a picture portraying the rear end of this truck?

A. I might have and I might not. I couldn't say to that.

Q. Do you have any recollection now as to whether or not you [543] may have taken a picture portraying the under side of the rear of the body of this truck?

A. I tried to, but it wouldn't show nothing accurate to show in the picture.

Q. Did you take any picture of the top of the tanks of this truck? A. No, I did not.

(Testimony of Edward Herzinger.)

Q. Had this truck been washed prior to the time you took these picturs, do you know?

A. I wouldn't know, but it didn't look like it

Q. Would you say, Mr. Herzinger, from your observation of the outside right rear tire on this truck on May 4, 1947, that the tire had been scorched or burned to such an extent that it was no longer usable?

A. No, it wasn't scorched that bad.

Q. In other words, the evidence of scorching on that tire, if any, was very mild, was it not?

A. Well, the tire was still inflated and it looked like it could have been used.

Cross-Examination

By Mr. Platt:

Q. Mr. Herzinger, you testified, with respect to the underground tanks, installation of the underground tanks. Do you know who actually installed the tanks?

A. Well, I wouldn't know who the man was who installed the [544] tanks. All I know I had to pay a monthly rental on the tanks and all the connections and equipment.

Q. You testified when you were on the stand the first day of the trial that there were lease arrangements between you and Standard Oil Company of California. You testified that a lease had been executed by the Standard Oil Company to O. J. McVey and Nellie R. McVey, his wife, then that lease was assigned to the Browns and was later assigned to you, isn't that true? A. Yes.

(Testimony of Edward Herzinger.)

Q. In other words, you were operating under the original lease of June 3, 1941, to O. J. McVey and Nellie R. McVey, his wife, which had been assigned to the Browns and later assigned to you?

A. I wouldn't know as to the date of the lease, when it was made, but it is the same lease.

Q. Aside from the date of the lease, that was the arrangement, wasn't it? I have the documents here and he has already testified to this arrangement. I want to call your attention to this lease, that is, this lease of June 3, 1941, which was assigned to the Browns and later assigned to you, and I want to call your attention——

The Court: Is that an exhibit in the case?

Mr. Platt: No, your Honor, it was admitted by stipulation. [545]

The Court: I think it should be admitted in evidence before the witness is asked any questions.

Mr. Platt: Well, we offer the original lease.

Mr. Parry: No objection.

The Court: It may be admitted as Defendant Standard Oil Exhibit B.

Mr. Platt: We have the assignments also, your Honor. We can offer them in evidence.

Mr. Parry: We have no objection to the three assignments which have been submitted to us.

The Court: The three assignments may be marked as one exhibit as Standard Oil's Exhibit C and admitted in evidence.

Mr. Platt: May we have the privilege of substituting copies?

(Testimony of Edward Herzinger.)

The Court: It may be understood that counsel may substitute photostatic copies.

Q. Now calling your attention, Mr. Herzinger, to this lease of June 3, 1941, between O. J. McVey and Nellie R. McVey, his wife, and Standard Oil Company of California, I want to read to you paragraph 4 of this lease. Under this arrangement Standard Oil was leasing from O. J. McVey and Nellie R. McVey, and later, as the testimony shows, this lease was assigned until the final assignment reached you and you, as the lessor under paragraph 4 of this lease agreed as follows: [546]

> "Lessor agrees, during the term of this lease, or any extension thereof, to maintain in good condition and repair all service station equipment, facilities, yards, driveways, and other improvements installed or made by Lessor on the demised premises, except such service equipment, facilities, yards, driveways, and other improvements owned by Lessee."

Now, during all of the time that you have occupied the premises, you have operated under this lease and the attendant assignments, is that true?

Mr. Parry: You mean up to the time of the fire?

Mr. Platt: Yes, up to the time of the fire.

A. Yes.

Mr. Platt: That is all.

Redirect Examination

By Mr. Daly:

Q. Where is Del Hardy now, if you know?

(Testimony of Edward Herzinger.)

A. He is deceased now.

Q. What? A. He died.

Mr. Parry: Plaintiff rests, your Honor.

The Court: Any further testimony?

Mr. Platt: No, your Honor.

Mr. Halley: None. [547]

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the testimony adduced and proceedings had in the foregoing-entitled matter, Edward Herzinger, Plaintiff, vs. Standard Oil Company of California, a Corporation, and E. J. Odermatt, Defendants, No. 680, at the trial held in Carson City, Nevada, commencing on the 8th of February, 1950, to and including the 16th of February, 1950, and that the foregoing pages, numbered 1 to 547 inclusive, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, August 1, 1950.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed August 2, 1950.

[Title of District Court and Cause.]

PROCEEDINGS IN CHAMBERS

Present:

R. P. PARRY, ESQ.,

JOHN H. DALY, ESQ.,

ORVILLE R. WILSON, ESQ.,
Attorneys for Plaintiff.

SAMUEL PLATT, ESQ.,
Attorney for Defendant,
Standard Oil Company of California.

GEORGE VARGAS, ESQ.,

JOHN S. HALLEY, ESQ.,
Attorneys for Defendant Odermatt.

* * *

The Court: An exception will be granted to the refusal to give Standard Oil Company of California Instruction No. 1, and also to giving defendant Odermatt's requested Instruction No. 1. Any further requests?

Mr. Daly: The plaintiff had one. It was instruction which was in our proposed instructions and numbered 5, begins: "If you find that the defendant E. J. Odermatt was not an agent of defendant Standard Oil Company of California, which Standard Oil Company has represented to the plaintiff that E. J. Odermatt was its agent and thereby caused plaintiff justifiably to rely * * *"

Mr. Platt: May the record note exception of the Standard Oil Company of California to the rulings of the Court upon the instructions submitted by the defendant Odermatt? We joined in the objections but I find we did not in the exception.

The Court: The record may so show. The plaintiff submitted instruction, the opening clause of which is: "If you find that the defendant E. J. Odermatt was not an agent of defendant Standard Oil Company of California," and the Court has refused to give such instruction. The instruction will be designated in the record as Instruction Proposed by the Plaintiff and Refused, numbered 1.

Mr. Daly: The record will show the plaintiff's exception.

* * *

The Court: Now I take the situation to be that this explanation now given to the jury is given without objection on the part of counsel, but that in not making any objection to the explanation, counsel has not waived any objection heretofore made or exception taken to Instruction No. 22 or any other instruction given by the Court.

Mr. Halley: Thank you, your Honor.

Mr. Daly: I think, if the Court please, that the plaintiff will object to the giving of that portion of the explanation requested by the jury of instruction which states that the plaintiff's burden of proving negligence and the proximate cause of the fire is not changed by the rule just mentioned.

The Court: The objection may be noted and plaintiff may have the benefit of that objection and exception that may be necessary.

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That the foregoing pages, numbered 1 to 17 inclusive, constitute a full, true, and correct transcript of my shorthand notes in case No. 680, entitled, Edward Herzinger, Plaintiff, vs. Standard Oil Company of California, a Corporation, and E. J. Odermatt, taken at the conclusion of the evidence in the trial of said case, in chambers and in open court in the presence of the jury and in the absence of the jury, in Carson City, Nevada, on February 16, 17, and 18, 1950.

Dated at Carson City, Nevada, November 1, 1950.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed U.S.D.C. November 10, 1950.

[Endorsed]: Filed U.S.C.A. November 13, 1950.

[Endorsed]: No. 12,668. United States Court of Appeals for the Ninth Circuit. Edward Herzinger, Appellant, vs. Standard Oil Company of California, a Corporation, and E. J. Odermatt, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed August 29, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 680

EDWARD HERZINGER,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT,

Appellees.

STATEMENT OF POINTS AND DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

The points on which Appellant intends to rely in this Court in this case are as follows:

1. The Court erred in failing to instruct the jury that: "If you find the defendant E. J. Odermatt is not an agent of the defendant Standard Oil Company of California, but the defendant Standard Oil Company of California has represented to the plaintiff that E. J. Odermatt was its agent and thereby caused plaintiff justifiably to rely upon the care or skill of such apparent agent or his assistants, then the defendant, Standard Oil Company of California is subject to liability to the plaintiff for harm caused by the lack of care or skill of the defendant E. J. Odermatt or his assistants the same as if the defendant E. J. Odermatt were the agent of the defendant Standard Oil Company of California," as

requested by plaintiff in writing, being designated as Plaintiff's Instruction No. 1, and plaintiff having objected to the failure of the Court to so instruct the jury.

2. The Court erred in explaining instructions No. 21 and No. 22 by instructing the jury over plaintiff's objection that: "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned," such instruction being, under the circumstances, misleading and prejudicial to plaintiff.

3. The evidence was insufficient to justify the verdict of the jury in that there was no substantial evidence to show that the defendant, Odermatt or his assistant, in the delivery of gasoline to the plaintiff on May 3, 1947, exercised due care, and in fact, the evidence disclosed as a matter of law that the defendant Odermatt's assistant was negligent in such delivery.

4. The Court erred in overruling plaintiff's objection to the testimony of the witness Jacob A. Ryan, under which rulings of the Court the witness was permitted to invade the province of the jury and to answer hypothetical questions which did not contain all of the elements of fact established by the evidence in this case.

5. That the Court erred in denying plaintiff's Motion for New Trial.

The following portions of the record as filed in this Court are material to the consideration of this Appeal and should be printed by the Clerk for the hearing of the case:

(1) Amended Complaint.

(2) Answer of Defendant, Standard Oil Company of California, a Corporation, to the Amended Complaint.

(3) Answer of defendant, E. J. Odermatt, to the Amended Complaint.

(4) Order on Pre-trial Conference.

(5) Request for Instructions by Jury.

(7) Explanation Requested by Jury of Instructions.

(8) Verdict of the Jury and Judgment Entered Therein.

(9) Motion for New Trial.

(10) Order Denying Motion for New Trial.

(11) Reporter's Transcript of Testimony.

(12) The following Exhibits introduced at the trial: Plaintiff's Exhibits: 1, 2, 3, 4, 6, 8, 9, 10, 18, 19, 20, 21, 22, 23, 24, 25, 27, and 28. Defendant's Exhibits: O-A, O-B, O-C, O-D, St. Oil B and St. Oil C.

(13) Notice of Appeal.

/s/ ORVILLE R. WILSON,

/s/ R. P. PARRY,

/s/ J. R. KEENAN,

/s/ T. M. ROBERTSON,

/s/ JOHN H. DALY,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 29, 1950.

No. 12668

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

EDWARD HERZINGER, Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT, Appellees.

Brief of Appellant

Upon Appeal From the District Court of the United States For the District of Nevada

HON. ROGER T. FOLEY, District Judge

ORVILLE R. WILSON,
Residing at Elko, Nevada,
R. P. PARRY
J. R. KEENAN
T. M. ROBERTSON
JOHN H. DALY
Residing at Twin Falls, Idaho,
Attorneys for Appellant.
SAMUEL PLATT
Residing at Reno, Nevada,
Attorney for Appellee Standard Oil Company of California.
MORLEY GRISWOLD
GEORGE L. VARGAS
JOHN S. HALLEY
Residing at Reno, Nevada,
A. L. PUCCINELLI
Residing at Elko, Nevada,
Attorneys for Appellee E. J. Orermatt.

Filed ....., 1951

....., Clerk

INDEX

PAGE

Jurisdiction 1

Statement of the Case 2

Specification of Errors 8

Summary of Argument 11

Argument 12

I. Plaintiff's Instruction No. 1 (Refused) should have been given to the jury 12

II. Court should not have included in "Explanation Requested by Jury of Instruction No. 22" the words: "Plaintiffs burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned" 15

III. The evidence was insufficient to justify the verdict 25

IV. The opinions of defendants' expert witness were not elicited by Hypothetical questions 30

Conclusion 40

CITATIONS

STATUTES: PAGE

28 U.S.C.A., Section 1291 2

28 U.S.C.A., Section 1332 (a) (1) 1

CASES:

Brown vs. *George Pepperdine Foundation*, 23 Cal. (2d) 256, 143 P. (2d) 929 20

Dierman vs. *Providence Hospital*, 31 Cal. (2d) 290, 188 P. (2d) 12 .....24, 28

Druzanich vs. *Criley*, 19 Cal (2d) 439, 122 P. (2d) 53 .....24, 29

Evans vs. *Cavanagh*, 58 Ida. 324, 73 P. (2d) 83 35

Fiske vs. *Wilkie*, 67 Cal. App. (2d) 440, 154 P. (2d) 725, 729 30

Lippold vs. *Kidd*, 126 Ore. 160, 269 Pac. 210, 59 A.L.R. 875 34

Lynch vs. *Oregon Lumber Co.*, 108 F. (2d) 283..15

McCandless vs. *United States*, 298 U. S. 342, 347, 80 L. Ed. 1205 15

Montgomery Ward & Co. vs. *Stevens*, 60 Nev. 358, 109 P. (2d) 895 15

CITATIONS

CASES (Continued): PAGE

Oettinger vs. *Stewart*, Calif. 1943, 137 P. (2d) 852 ..... 20, 21, 22

Pacific Greyhound Lines vs. *Zane*, 160 F. (2d) 731 15

Tex. & P. Ry. Co. vs. *Rhodes*, 71 Fed. 145 13

Thorwegan vs. *King*, 111 U. S. 549, 28 L. Ed. 514 13

Van Cello vs. *Clark*, 157 Wash. 321, 289 Pac. 19 14

Williams vs. *Field Transportation Co.*, Calif. 1946, 166 P. (2d) 884 ..... 24, 29

MISCELLANEOUS:

A.L.R., Vol. 82, p. 1468 38

A.L.R., Vol. 82, p. 1471 39

American Jurisprudence, Vol. 2, Agency, Sec. 104, p. 86 14

American Jurisprudence, Vol. 20, Evidence, Sec. 789, p. 662 37

CITATIONS

MISCELLANEOUS (Continued): PAGE

American Jurisprudence, Vol. 38, Negligence, Sec. 311, p. 1007 23

California Jury Instructions, Civil, 3rd Rev. Ed., 206 (d) 23

Corpus Juris, Vol. 2, Agency, Sec. 70, p. 461 14

Corpus Juris, Vol. 64, Trial, Sec. 714, p. 911 13

Corpus Juris Secundum, Vol. 2, Agency, Sec. 29, p. 1063 14

Restatement of the Law, 1 Agency, p. 590, Sec. 267 14

Websters International Dictionary 24, 25

Wigmore on Evidence, Third Edition, Vol. II, Sec. 672, p. 792 36

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

EDWARD HERZINGER, Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT, Appellees.

Upon Appeal From the District Court of the United States For the District of Nevada

Brief of Appellant

JURISDICTION

This is an appeal from final judgment of the District Court of the United States for the District of Nevada, entered on February 18, 1950, upon the verdict of the jury (R. Vol. I, p. 47) and from the final decision of such District Court denying plaintiff's motion for new trial entered on June 23, 1950, (R. Vol. I, p. 49). The jurisdiction of the District Court of the United States for the District of Nevada in this action was invoked under Paragraph (a) (1) of Section 1332, Title 28, U.S.C.A. Paragraph I of the Amended Complaint (R. Vol. I, p. 3) alleges that plaintiff is a citizen of the State of Idaho; that defendant Standard Oil Company of California is a corporation incorporated under the laws of the State of Delaware; that the defendant E. J. Odermatt is a citizen of the State of Nevada. Paragraph II of

the Amended Complaint (R. Vol. I, p. 3) alleges that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000. Both defendants in their answers have admitted the allegations of paragraphs I and II of the Amended Complaint (R. Vol. I, pp. 9 & 14). These admissions are also contained in the order on pre-trial conference (R. Vol. I, p. 18). The jurisdiction of this Court is invoked under Section 1291, Title 28, U.S.C.A.

STATEMENT OF THE CASE

This action arose out of a fire which occurred shortly after noon on May 3, 1947, (R. Vol. I, pp. 20 & 21) at a place called Mineral Hot Springs which is located about a mile and a half north of Contact, Nevada, on U. S. Highway No. 93 (R. Vol. I, p. 87).

Mineral Hot Springs was owned and operated on and prior to the day of the fire by the plaintiff Edward Herzinger, a resident of Buhl, Idaho (R. Vol. I, p. 259). It consisted of several buildings, most of which were located adjacent to and on the east side of U. S. Highway 93 (R. Vol. I, p. 87), from which the plaintiff was operating on and prior to May 3, 1947, a bath house, a retail grocery, a bar room, tourist cabins and an automobile service station (R. Vol. I, pp. 87, 92-95).

The petroleum products dispensed by the plaintiff at the automobile service station were products of the defendant Standard Oil Company of California (R. Vol. I, p. 259). These products were delivered to

Mineral Hot Springs by defendant E. J. Odermatt or an employe of defendant E. J. Odermatt (R. Vol. I, p. 20). These deliveries were made from a bulk plant located at Wells, Nevada, and owned by Standard Oil Company of California (R. Vol. I, pp. 76 & 77).

On May 3, 1947, the day of the fire, one Lee Nielson, an employee of defendant E. J. Odermatt, drove a 1942 Ford six-cylinder truck belonging to and being used in the business of defendant E. J. Odermatt from Wells, Nevada, a distance of some 52 miles (R. Vol. II, pp. 401, 404). Upon his arrival at Mineral Hot Springs, Nielson apparently filled a gasoline underground storage tank, the filler pipe of which was located near the door to the building on the premises used as a grocery store and underneath a canopy, which ran to the pumps from which gasoline was dispened at retail (R. Vol. I, pp. 95, 98).

Nielson then moved the truck to the west of the pumps and began filling the second gasoline underground storage tank located on the premises through a filler pipe located on the island between the two retail pumps (R. Vol. II, pp. 413 & 414).

The testimony of one Ross Moseley, who managed Mineral Hot Springs in the absence of the plaintiff, and the testimony of Dale Klitz, who was in the bar room at the time the fire started, was to the effect that Nielson had come into the bar room while the first storage tank was being filled and purchased a soft drink, that he had remained in the bar room

several minutes and then moved the truck to a position from which the second storage tank could be filled and that he then returned to the bar room and that at the time the fire was discovered he was seated on a stool in the middle of the bar room watching a projected picture and listening to music from what was called a Panorama machine, which was a coin operated amusement device which played music and projected a picture on a screen (R. Vol. I, pp. 99-102, 194-196).

Moseley testified that the first indication he had of anything wrong was a flash of fire right under the truck (R. Vol. I, pp. 103 & 104); that he and Nielson, who apparently discovered the fire at about the same time, ran out, reaching the door of the bar room at about the same time (R. Vol. I, p. 104). Klitz, the only other person whose presence on the premises was definitely established, noticed the fire seconds later and also left the bar room by the front door as fast as his legs would carry him (R. Vol. I, pp. 199 & 200). The flames spread rapidly and destroyed most of the buildings on the premises, together with the complete stock of merchandise. (R. Vol. I, pp. 107- 109-111). The replacement cost of the buildings destroyed by fire was shown to be $12,540 (R. Vol. I, pp. 187 & 188); the inventory of goods, wares and merchandise was established at in excess

of $15,767.59 (R. Vol. I, pp. 295 & 296, Plaintiff's Exhibit 11), the furniture and fixtures destroyed were shown to have a value of $10,900 (R. Vol. I, pp. 281-287), and silver and currency destroyed of a value of $1,675 (R. Vol. I, pp. 108 & 293).

At the conclusion of plaintiff's case (R. Vol. II, pp. 399-400) the defendant Standard Oil Company of California moved for a directed verdict on the grounds that the defendant Odermatt was not an agent but was an independent contractor for whose actions the defendant Standard Oil Company of California was not liable. This motion was denied. Both defendants moved for a directed verdict upon the ground that the evidence failed to establish negligence and the proximate cause of the fire. This motion was denied, the Court holding that this was a proper case for the application of the doctrine res ipsa loquitur.

The defendants called the driver of truck, Lee Nielson, who testified on cross-examination in part that he was in the bar room only a matter of seconds while the first storage tank was being filled. He stated, however, that he at that time purchased a bottle of Pepsi-Cola, drank a few swallows of it, and had some conversation with Moseley (R. Vol. II, pp. 440 & 441). He further testified that he did not go into the bar room again until after the delivery of gasoline to the second storage tank had been completed (R. Vol. II, p. 441), that he disconnected the hose lead-

ing from the compartment on the truck to the filler pipe of the second storage tank, drained it and laid it on the ground (R. Vol. II, p. 416) with the nozzle end of the hose still in the filler pipe of the second storage tank (R. Vol. II, p. 432), and that the purpose of going into the bar room the second time was to make out his invoice for the sale of gasoline to the plaintiff (R. Vol. II, p. 416). However, he had not begun to prepare any invoice at the time of the fire; instead he drank some of the Pepsi-Cola, put a coin in the Panorama machine and watched it (R. Vol. II, pp. 420 & 421).

As a part of the defense, one Jacob Ryan qualified as an expert and testified, beginning in the afternoon of Wednesday, February 16, 1950 (R. Vol. II, p. 498). He was asked several hypothetical questions on direct examination (R. Vol. II, pp. 503-509). After cross examination was completed, the witness was asked some additional questions on direct examination. These (R. Vol. II, pp. 522 & 523) are questions calling for an opinion of the witness Ryan based upon his hearing and observation of the testimony already offered. The witness was asked "As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?" An objection was made to the question as follows: "Objected to as not stating facts upon which it is based. It must be a hypothetical question and it does not state any facts at all." The objection was overruled and the witness answered

"I can see no such possibility." (R. Vol. II, pp. 522 & 523.)

At the conclusion of the evidence and argument of counsel, the Court instructed the jury (R. Vol. I, pp. 25-46). The jury retired at approximately 2:30 o'clock P. M. on Friday, February 17. At about 12:30 o'clock A. M., of Saturday, February 18, a note (R. Vol. I, p. 23) was brought to the Court, which was in substance a request by the jury for clarification of Instructions No. 21 and 22. The note itself shows the confusion in the minds of the jury as to the exact effect of the doctrine of res ipsa loquitur as to which party, if either, had the duty of explaining to the jury exactly how the fire started.

The Court, in response to the inqury, called in the jury and instructed them in accordance with Explanation Requested by Jury of Instruction No. 22 (R. Vol. I, pp. 23-25). The plaintiff objected to a portion of this explanation. The jury then again retired and returned with a verdict for the defendants at about 2:30 A. M. on Saturday, February 18.

Judgment was entered on this verdict and a motion for new trial was timely made, argued before the Court on June 23, 1950, and denied by the Court (R. Vol. I, pp. 47-50). Appeal is from the judgment entered on the verdict of the jury on February 18, 1950, and from the order denying plaintiff's motion for new trial entered on June 23, 1950.

SPECIFICATION OF ERRORS

I.

The Court erred in failing to instruct the jury that, "If you find the defendant E. J. Odermatt is not an agent of the defendant Standard Oil Company of California, but the defendant Standard Oil Company of California has represented to the plaintiff that E. J. Odermatt was its agent and thereby caused plaintiff justifiably to rely upon the care or skill of such apparent agent or his assistants, then the defendant Standard Oil Company of California is subject to liability to the plaintiff for harm caused by the lack of care or skill of the defendant E. J. Odermatt or his assistants the same as if the defendant E. J. Odermatt were the agent of the defendant Standard Oil Company of California." As requested by plaintiff in writing (R. Vol. I. p. 220), being designated as "Plaintiff's Instruction No. 1 (Refused)", as shown by proceedings in chambers (R. Vol. II, pp. 536 & 537).

II.

The Court erred in including in its "Explanation Requested by Jury of Instruction No. 22" (R. Vol. I, pp. 23, 24 & 25) the following: "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned." which portion of the explanation was objected to by plaintiff (R. Vol. II, p. 537).

III.

The evidence was insufficient to justify the verdict of the jury in that there was no substantial evidence to show that the defendant, Odermatt or his assistant, in the delivery of gasoline to the plaintiff on May 3, 1947, exercised due care, and in fact, the evidence disclosed as a matter of law that the defendant Odermatt's assistant was negligent in such delivery.

IV.

The Court erred in permitting the witness Jacob A. Ryan, over plaintiff's objection, to testify as follows: (R. Vol. II, pp. 522 & 523).

"Redirect Examination

"By Mr. Platt:

"Q. Mr. Ryan, the cross-examination has suggested another question on redirect examination. From your hearing and observation of the testimony already offered in this case, is it your opinion that there was any outside agency at the time of the fire at or near the truck which caused the fire?

"Mr. Parry: Objected to as not a proper hypothetical question by reference and not proper redirect. I did not go into that on cross-examination.

"The Court: I think counsel asked permission to ask another question on direct.

"Mr. Platt: I did say redirect, but I can call him on direct.

"The Court: Objection overruled. Answer the question.

"A. I saw no evidence indicating there was a source of ignition which the operator of the truck—

"Mr. Parry: I object to that as invading the province of the jury.

"The Court: It is not responsive. Read the question.

"(Question read.) (533)

"Mr. Parry: I renew my objection—

"The Court: Objection will be sustained.

"Q. As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?

"Mr. Parry: Objected to as not stating facts upon which it is based. It must be a hypothetical question and it does not state any facts at all.

"The Court: Objection will be overruled.

"A. I can see no such possibility."

V.

The Court erred in denying plaintiff's motion for new trial, which motion was upon the grounds set forth in numbers I, II, III and IV of the Specification of Errors.

SUMMARY OF ARGUMENT

I.

Plaintiff's Instruction No. 1 (Refused) (R. Vol. 1, p. 22a) is a correct statement of a portion of the substantive law within the issues of the case and should have been given to the jury.

II.

The inclusion in the Court's "Explanation Requested by Jury of Instruction No. 22" (R. Vol. I, pp. 23-25) of the following, "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned," was under the circumstances misleading, confusing and prejudicial to plaintiff.

III.

The evidence introduced by the defendants disclosed, as a matter of law, that the assistant of the defendant Odermatt was negligent and the defendants wholly failed to sustain the burden imposed upon them, by the application of the doctrine of res ipsa loquitur, of showing that due care was exercised in the management of the instrumentalities under the control of the defendants.

IV.

Jacob A. Ryan, an expert produced by the defendants, was improperly permitted to state his opinion on one of the fundamental issues in the case

in response to questions which were not hypothetical and did not apprise the jury of the facts upon which the opinion was based.

ARGUMENT

I.

Plaintiff's Instruction No. 1 (Refused), is a correct statement of a portion of the substantive law within the issues of the case and should have been given to the jury.

Appellant's first specification of error is the failure of the Court to instruct the jury that: "If you find the defendant E. J. Odermatt is not an agent of the defendant Standard Oil Company of California, but the defendant Standard Oil Company of California has represented to the plaintiff that E. J. Odermatt was its agent and thereby caused plaintiff justifiably to rely upon the care or skill of such apparent agent or his assistants, then the defendant Standard Oil Company of California is subject to liability to the plaintiff for harm caused by the lack of care or skill of the defendant E. J. Odermatt or his assistants the same as if the defendant E. J. Odermatt were the agent of the defendant Standard Oil Company of California." as requested by plaintiff in writing (R. Vol. I p. 22a), being designated as Plaintiff's Instruction No. 1 (Refused), as shown by proceedings in Chambers (R. Vol. II, pp. 536 & 537).

It is, of course, well settled that it is error for

the trial court to refuse to give an instruction to the jury which contains a correct statement of the law and is applicable to the issues raised in the case. In *Thorwegan vs. King*, (1884) 111 U. S. 549, 28 L. Ed. 514, which was an action to recover damages for deceit, the Supreme Court said, (p. 516):

> "The proposition contained in the request is a correct statement of the law and strictly applicable to the case. The defendant was entitled to have it given to the jury, if not in the precise form asked, at least in substance."

The Federal rule also is stated in *Tex. and P. Ry. Co.* vs. *Rhodes*, 71 Fed. 145 (C.C.A. 5, 1895), an action for damages for personal injuries against the railroad company. In this case the court said (p. 148):

> "Among the rules laid down in repeated decisions of the Federal courts, which relate to the duties of the trial judge to the suitors in the pending case, it is well established that, when a special charge is requested, and the charge recites sound propositions of law, applicable to the material issues of the case, and the special charge, or the substance thereof, has not been covered in the court's charge, the same should be given to the jury."

The Federal rule, as stated above, is supported by the great weight of authority. (64 C. J., Trial, Sec. 714, p. 911, and cases cited).

The error is not cured even if part of the instruc-

tion is given. In *Van Cello* vs. *Clark*, 157 Wash. 321, 289 Pac. 19 (1930), an action for damages resulting from an automobile collision, the court, in reversing the lower court, said (p. 21):

> "This requested instruction embodies a correct statement of the law, and should have been given. The first part of the instruction, to the effect that negligence is never presumed, was given by the court, but this does not preclude appellant from availing himself of the error committed by the trial court in failing to give the balance of the instruction."

It is not open to question that the requested instruction embodies a correct and sound statement of law and was clearly within the issues of the case. (R. Vol. I, pp. 3, 9, 18, 259-262, 301-302, Plaintiff's Exhibits 1, 2, 3, 4 & 10). The principle of law applicable appears in the Restatement of the Law, 1 Agency p. 590, Sec. 267, as follows:

> "One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such."

2 C. J., Agency, Sec. 70, p. 461.

2 C. J. S., Agency, Sec. 29, p. 1063.

2 Am. Jur., Agency, Sec. 104, p. 86.

This statement is quoted with approval in *Montgomery Ward & Co.* vs. *Stevens*, 60 Nev. 358, 109 P. (2d) 895 (1941). This was an action to recover damages alleged to have been sustained by plaintiffs on account of the negligent installation of an automatic burning oil stove. In appealing from a judgment for plaintiffs, the defendant contended that it was not responsible because one Blanchard, who actually installed the stove, was not acting as its servant but as an independent contractor. In affirming, the Supreme Court of Nevada held that plaintiffs were not bound by any agreement between defendant and Blanchard establishing the latter as an independent contractor, since they had no knowledge of the agreement and Blanchard had been held out to them as the agent of the defendant.

Appellant submits that the refusal of the trial court to so instruct the jury, as requested by plaintiff, was clearly reversible error. Appellant is not required to show both error and prejudice unless it *affirmatively* appears from the whole record that the error was not prejudicial. *Lynch* vs. *Oregon Lumber Company*, 108 F. (2d) 283, 286, (C.C.A. 9, 1939); *Pacific Greyhound Lines* vs. *Zane*, 160 F. (2d) 731 (C.C.A. 9, 1947); *McCandless* vs. *United States*, 298 U. S. 342, 347, 80 L. Ed. 1205 (1936).

II.

The inclusion in the Court's "Explanation Requested by Jury of Instruction No. 22" of the following, "Plaintiff's burden of proving negligence and

the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned." was under the circumstances misleading, confusing and prejudicial to plaintiff.

By Instructions 21 (R. Vol. I, pp. 40 & 41) the Court instructed the jury as follows:

> "The mere fact that an accident happened—that the fire happened—considered alone, does not support an inference that some party, or any party, to this action was negligent. The burden is upon the plaintiff in this case to prove by a preponderance of the evidence not only that the driver who delivered the gasoline was negligent in the way he delivered it, but also that his negligence if any was the proximate cause of the fire."

The remaining portion of the instruction defines "proximate cause" and then states:

> "If you do not find the driver was negligent, your verdict should be for the defendants. If he were negligent, but his negligence was not the proximate cause of the fire, your verdict should be for the defendants.
>
> "If the fire did occur due to some cause other than the driver's negligence, then the plaintiff should not recover, whether the driver was negligent or not."

By Instruction 22 (R. Vol. I, pp. 41 & 42) the Court instructed the jury that if it believed that the

plaintiff owned or controlled the underground storage tanks, the appliances in the building including all of the electrical wiring, power plant, oil refrigerator, electric refrigerator, butane water heater, butane stove, motor in panorama machine, motor in juke box, refrigerator, compressor and motor, the plaintiff had the burden to prove by a preponderance of the evidence that the fire was not caused by any of those appliances. The Instruction continued that if the jury found the fire was not caused by any of these appliances and it further found that there was an accidental occurrence as claimed by the plaintiff, namely: That shortly after noon on the 3rd day of May, 1947, the defendant E. J. Odermatt, through an assistant, was delivering gasoline to the plaintiff and that said gasoline became ignited and flames spread to buildings owned by the plaintiff destroying them; and if it should find that from the accidental event, as a proximate result thereof, plaintiff has suffered damages the jury was instructed as follows:

> "An inference arises that the proximate cause of the occurrence in question was some negligent conduct on the part of the defendant E. J. Odermatt or his assistant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome

that inference, bearing in mind that it is incumbent upon the defendant E. J. Odermatt, to rebut the inference by showing that he or his assistant did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on his part or on the part of his assistant."

After deliberating some ten hours the foreman of the jury sent a note to the Court (R. Vol. I, p. 23) which read as follows:

"Your Honor Judge Foley: The jury cannot interpret the Instruction No. 22 with reference to inference which seems to be somewhat vague as our position as to the form of evidence and the burden upon the plaintiff or the defendant. " 'The proximate cause of an event is distinguished from a remote cause* * *. (Instruction 21) 'If you do not find the driver was negligent, your verdict should be for the defendants. If he were negligent, but his negligence was not the proximate cause of the fire, etc. (Inst. 21).' An interpretation would.

/s/ Russell Mills,
Foreman"

It would thus seem that having read the instructions of the Court carefully the members of the jury were confused by the apparent contradiction between Instruction 21 and 22 with reference to the

inference which arose or did not arise from the happening of the accident and which should have been made available to the plaintiff by the Court's ruling that the doctrine of res ipsa loquitor applied and particularly the jury was desirous of knowing whether someone had the duty to tell them exactly how the fire started and if so, which of the parties had this burden.

In response to this note an explanation was given to the jury which after explaining the first part of Instruction 22 stated as follows (R. Vol. I, pp. 23-25):

> "That an inference then arises that the proximate cause of the fire was some negligent conduct on the part of the defendant Odermatt, or his assistant. That inference is a form of evidence. If you do not find any evidence contrary to the inference, the inference would support a verdict for the plaintiff. If there is evidence contrary to the inference, such inference and the contrary evidence must be weighed, having in mind that it is not necessary for the defendant to overcome the inference by a preponderance of the evidence. Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned. It follows, therefore, that in order to hold the defendant liable, the inference must have greater weight, more convincing force in the mind of the jury

than the opposing explanation offered by the defendant."

The confusion in the minds of the jury resulting in its request to the Court for further explanation of Instructions No. 21 and 22 is easily understandable. The two instructions are of themselves confusing. Instruction 21 is a standard instruction in negligence actions and begins by stating in effect that no inference that some party or any party to the action was negligent is to be drawn from the mere fact that an accident happened. Instruction 22, based upon the doctrine of res ipsa loquitur which the trial Court properly held was applicable to the circumstances involved, is in its very essence contradictory to Instruction 21. This is true because if the doctrine of res ipsa loquitur applies to a circumstance, then an inference or a presumption does arise from the mere fact that the particular accident happened. This inference or presumption is that the accident would not have happened except for some negligent conduct on the part of the defendant, or, in this case, the assistant of the defendant Odermatt. This confusion was recognized in the case of *Oettinger* vs. *Stewart* (Cal. 1943, 137 P. (2d) 852, p. 856) in that the giving of instructions remarkably similar to Instructions No. 21 and 22 was held reversible error. A similar holding is contained in the opinion of the California Supreme Court in the case of *Brown* vs. *George Pepperdine Foundation* (1943), 23 Cal. (2d) 256, 143 P. (2d) 929, 931.

It is conceded that the plaintiff did not object to the giving of Instructions No. 21 and 22. However, the plaintiff did object to the inclusion in the Court's Explanation Requested by Jury of Instruction No. 22 of the words "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned." Inasmuch as the plaintiff did object to this portion of the explanation, there was in effect an objection to Instructions No. 21 and 22 as amended by the Explanation which should entitle the plaintiff to urge the giving of Instructions No. 21 and 22 as error. The objection of the plaintiff was an attempt to avoid the same confusion in the minds of the jury recognized in the cases just above cited. In *Oettinger* vs. *Stewart*, just cited, the trial court gave also the following instruction (137 p. (2d) 856):

> " 'If, after considering all of the evidence you find that the accident might have been caused in several different ways, and you further cannot determine what was the proximate cause of the accident which caused plaintiff's injuries, then your verdict must be for the defendants.' "

In commenting on this instruction, the California Court stated:

> "This instruction placed upon the plaintiff the duty of proving the cause of defendant's falling, and directed a finding in favor of defendants even in the event that defendant May Stewart

> failed to explain or excuse her actions. It nullified the instruction on res ipsa loquitur and was prejudicially erroneous."

It is also conceded that the trial court in this case did not give an instruction identical with the quoted instruction from the case of *Oettinger* vs. *Stewart.* However, it is plaintiff's position that the inclusion of the words which were objected to by the plaintiff (R. Vol. II, p. 537) in effect nullified the instruction on res ipsa loquitur and was prejudicially erroneous, and we think this is true even though as an abstract statement of the law of res ipsa loquitur it were conceded, for the purpose of this argument, that the words were correct.

The circumstances under which the explanation of the Court was given clearly show that the jury must have carefully read and considered the instructions of the court and had found that none of the instrumentalities under the control of the plaintiff had caused the fire, otherwise they would not have been concerned with the inference and the burden upon the plaintiff or the defendant. The Jury's Request for Explanation of Instruction No. 22 (R. Vol. I, p. 23) also clearly shows that the jury was concerned over the proximate cause of the fire. The most reasonable analysis of the situation is that the question in the minds of the jury was whether either party to the action had the duty under the law to explain exactly what caused the fire. The words which were objected to by the plaintiff were

taken from California Jury Instructions, Civil, Third Revised Edition, 206 (d). The pertinent portion of that instruction reads as follows:

> "Plaintiff's burden of proving negligence by a preponderance of the evidence is not changed by the rule just mentioned."

At the defendants' request and over objection by the plaintiff, that sentence was changed to read as follows:

> "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned."

The insertion of the words "and the proximate cause of the fire", in view of the nature of the inquiry from the jury, nullified the benefits of the doctrine of res ipsa loquitur which the Court had properly ruled was applicable to the circumstances involved.

We are not here contending that the burden of proof shifts to the defendant upon the application of the doctrine of res ipsa loquitor. We do urge, however, that it is the rule under the great weight of authority that the application of the doctrine of res ipsa loquitur does result in a shifting of the burden of going forward with the proof. (38 Am. Jur., Negligence, Sec. 311, p. 1007). Since this is true, it is an alteration in the plaintiff's burden in some respects. In a case such as this, where the doctrine of res ipsa loquitur is properly applicable, the plaintiff

need only prove that the accident happened as he claimed it did; that the accident was one which in the ordinary course of events did not happen; and that no instrumentality under his control was the cause of the accident. When this is done, a burden is placed upon the defendant to either (1) satisfactorily explain the accident by showing a definite cause, in which cause there is no element of negligence on the part of the defendant, or (2) that the defendant (or in this case, an employee of the defendnat) so controlled and operated the instrumentalities under his control in all possible respects as necessary to lead to the conclusion that the accident could not have happened from want of care. (*Diermen* vs. *Providence Hospital, et al,* 1947, 31 Cal. (2d) 290, 188 P. (2d) 12, p. 15; *Druzanich* vs. *Crilley, et al,* (1942), 19 Cal. (2d) 439, 122 P. (2d) 53; *Williams* vs. *Field Transportation Company, et al,* (D.C.A. 2d Dist., Cal. 1946), 166 P. (2d) 884, 887)

It is therefore believed that the trial court, having given to the jury Instruction No. 21 and No. 22 and having received the inquiry it did from the jury, was in error in stating to the jury (and it can only be concluded that the court was referring to Instruction No. 21) that there was no change in the plaintiff's burden of proving negligence and the proximate cause of the fire as a result of the application of the doctrine of res ipsa loquitur.

The word "change" used as an intransitive verb is defined by Webster's International Dictionary

as meaning "to be altered; to undergo variation; to alter; to vary; as, men sometimes *change* for the better." To say that the plaintiff's burden of proving negligence and the proximate cause of the fire is not changed by the application of the doctrine of res ipsa loquitur is incorrect, since the plaintiff's burden is altered or varied to a degree by the application of the doctrine. That there is unquestionably an alteration, or variation, in the plaintiff's burden of proof in a res ipsa loquitur case is demonstrated by the cases cited above and under part III of this argument.

We submit that the Court committed prejudicial error in including in his explanation to the jury the words objected to by plaintiff. It cannot be denied that Instructions No. 21 and 22 were contradictory and confusing. The jury itself said so. The so-called Explanation simply added to the confusion and was erroneous in itself.

III.

The evidence introduced by the defendants disclosed, as a matter of law, that the assistant of the defendant Odermatt was negligent and the defendants wholly failed to sustain the burden imposed upon them, by the application of the doctrine of res ipsa loquitur, of showing that due care was exercised in the management of the instrumentalities under the control of the defendant.

Assuming, as it is believed proper in view of the wording of the note sent to the Court by the jury (R.

Vol. I, p. 23), that the jury had found that none of the instrumentalities under the control of the plaintiff caused the fire and that an accident did occur as claimed by the plaintiff, it must be concluded that the plaintiff is entitled to the benefit of the inference or presumption that the proximate cause of the occurrence was some negligent conduct on the part of the defendant E. J. Odermatt or his assistant.

Under Instruction No. 22 (R. Vol. I, p. 42), it was incumbant upon the defendant to rebut the inference or presumption by showing that the defendant E. J. Odermatt or his assistant did in fact exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure on his part or on the part of his assistant.

The evidence introduced by the defendants at the trial did not rebut the inference or presumption. It did not show that E. J. Odermatt's assistant did exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on his part or on the part of his assistant. On the contrary, the testimony of the driver of the truck, Lee Nielson, (R. Vol. II, pp. 400-446), when coupled with the testimony of the expert Jacob Ryan (R. Vol. II, pp. 498-524), clearly showed that the driver's actions both while and after delivery of gasoline to the plaintiff's tanks were negligent and in violation of standard safety rules. The testimony of Nielson shows that he left the truck while gasoline was being delivered to the plaintiff's

tanks (R. Vol. II, p. 440) which was in violation of an accepted safety rule as testified to by the witness Ryan (R. Vol. II, p. 520). There is no testimony to indicate that Nielson made any determination that there were no sources of ignition present during the delivery of gasoline to the premises of the plaintiff, which, according to the testimony of the witness Ryan (R. Vol. II, p. 520), was the employee's responsibility under an accepted safety rule. Nielson testified that when the delivery was completed in the second underground storage tank that he disconnected the hose from the tank on the truck, drained it, laid it down on the ground leaving the other end still in the filler pipe and then went into the bar room on the plaintiff's premises to make out his invoice (R. Vol. II, pp. 416, 431, 432). Why the hose was not placed on the truck and the cap placed on the filler pipe as was done by Nielson following the filling of the first underground tank (R. Vol. II, p. 440), was not shown and we submit that it is most logical to believe that if the nozzle of the hose was still in the filler pipe to the underground tank, that gasoline was being delivered through the hose at the time the fire began. However, assuming that Nielson's testimony is true, his actions were obviouly negligent.

As has been stated, it is not the plaintiff's position that the application of the doctrine of res ipsa loquitur results in a shifting of the burden of proof to the defendant; however, it is the plaintiff's posi-

tion that the application of the doctrine of res ipsa loquitur does place a burden upon the defendant and that that burden has been properly defined by the Supreme Court of the State of California in the case of *Dierman* vs. *Providence Hospital, et al,* (1947), 31 Cal. (2d) 290, 188 P. (2d) 12, p. 15:

> "The general principle is, as stated by this court in 1919 (in denying a hearing in Bourguignon v. Peninsular Ry. Co., 40 Cal. App. 689, 694, 695, 181 P. 669, 671) 'that, where the accident is of such a character that it speaks for itself, as it did in this case, * * * the defendant will not be held blameless, except upon a showing either (1) of satisfactory explanation of the accident; that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory, in the sense that it covers all causes which due care on the part of the defendant might have prevented.' "

In that case the court held that the defendant had not met either of the duties above stated, and that a judgment rendered for the defendant should be re-

versed and the cause remanded for a new trial.

A similar holding upon similar grounds again by the Supreme Court of California is in the case of *Druzanich* vs. *Criley, et al* (1942) 19 Cal. (2d) 439, 122 P. (2d) 53, wherein the court stated (p. 56):

> "However, the trier of fact cannot arbitrarily disregard the inference. As stated in Ales v. Ryan, 8 Cal. 2d 82, 99, 64 P. 2d 409, 417: 'The rule is well settled by a multitude of decisions of the appellate courts of this state to the effect that the inference of negligence which is created by the rule res ipsa loquitur is in itself evidence which may not be disregarded by the jury and which in the absence of any other evidence as to negligence, necessitates a verdict in favor of the plaintiff. It is incumbent on the defendant to rebut the prima facie case so created by showing that he used the care required of him under the circumstances. The burden is cast upon the defendant to meet or overcome the prima facie case made against him.' "

To a similar effect is the language in the case of *Williams* vs. *Field Transportation Company, et al,* (D.C.A. 2d Dist., Cal. 1946), 166 P. (2d) 884, 887:

> "Where in an action for personal injuries only general negligence is alleged and the instrumentality which caused the injury was under the exclusive control of defendant and the accident is of the variety that does not occur in the

> ordinary course of events if proper care by the defendant has been exercised, the doctrine of res ipsa loquitur applies; and unless defendant so explains the accident as to rebut the inference of his negligence plaintiff is entitled to recover. And that the defendant does not know the cause is no explanation. Ireland v. Marsden, 108 Cal. App. 632, 643, 291 P. 912; Cooper v. Quandt, 105 Cal. App. 506, 508, 288 P. 79; Druzanich v. Criley, 19 Cal. 2d 439, 444, 122 P. 2d 53."

To a similar effect is the case of *Fiske, et al,* vs. *Wilkie,* (1945) 67 Cal. App. (2d) 440, 154 P. (2d) 725, 729.

In the instant case, the jury was not entitled to disregard the inference or presumption in view of the fact that the evidence introduced by the defendant showed as a matter of law that the defendant E. J. Odermatt's assistant was negligent in the delivery of the gasoline to the underground storage tanks of the plaintiff. This is particularly true, since the Jury's Request for Explanation of Instruction No. 22 (R. Vol. I, p. 23), when read in the light of Instruction No. 22 (R. Vol. I, pp. 41-42), shows clearly that the jury had determined that none of the instrumentalities under plaintiff's control caused the fire and that the fire occurred as claimed by the plaintiff.

IV.

Jacob A. Ryan, an expert produced by the defendants, was improperly permitted to state his opinion

on one of the fundamental issues in the case in response to questions which were not hypothetical and did not apprise the jury of the facts upon which the opinion was based.

As a final witness, the defendants called the only expert who testified at the trial. The witness chosen for this high light of the trial from the many who must have been available to the defendants was Jacob A. Ryan.

It appears in the record (Vol. II, pages 498, 499, 505 and 506) that Mr. Ryan represented himself to the jury as exceedingly well qualified. He stated that he was a research engineer by profession being a graduate civil engineer. For about 10 years after his graduation, he engaged in construction work, and in 1920 was employed by Standard Oil Company where, after only a few weeks, he became engaged in testing work, which work consisted of testing how processes are operating where there are temperatures, pressure, heat flows, vapors, and so forth.

His work included fire prevention and hazards. As early as the middle 1920's, he supervised a great many tests designed to learn how fires may be started, the flow of vapors, velocity, the composition of vapors that are involved in gasoline and other petroleum products, storage tanks and so forth. This work was carried on quite extensively by him for three to five years. He had for thirty years been employed by Standard Oil Company of California or one of its subsidiaries and all that time engaged

in the professional activities and was from time to time called on for consultation in connection with fire prevention and fire hazards.

He was established before the jury as the man who knew the answers to all of the questions relating to fire, its causes and its prevention.

With this build-up, he was permitted to express an opinion upon one of the most fundamental questions involved in this case, without the facts, upon which such an opinion could be based, being incorporated into the question which elicited the opinion.

It is felt that the admission of the testimony of the witness Jacob A. Ryan (R. Vol. II, pp. 522 & 523) was clearly prejudicial error. This testimony is as follows:

"Redirect Examination

"By Mr. Platt:

"Q. Mr. Ryan, the cross-examination has suggested another question on redirect examination. From your hearing and observation of the testimony already offered in this case, is it your opinion that there was any outside agency at the time of the fire at or near the truck which caused the fire?

"Mr. Parry: Objected to as not a proper hypothetical question by reference and not proper redirect. I did not go into that on cross-examination.

"The Court: I think counsel asked permission to ask another question on direct.

"Mr. Platt: I did say redirect, but I can call him on direct.

"The Court: Objection overruled. Answer the question.

"A. I saw no evidence indicating there was a source of ignition which the operator of the truck - - -

"Mr. Parry: I object to that as invading the province of the jury.

"The Court: It is not responsive. Read the question.

(Question read)

"Mr. Parry: I renew my objection—

"The Court: Objection will be sustained.

"Q. As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?

"Mr. Parry: Objected to as not stating facts upon which it is based. It must be a hypothetical question and it does not state any facts at all.

"The Court: Objection will be overruled.

"A. I can see no such possibility."

By his last answer the witness was permitted to and did give a positive answer to one of the fundamental issues in the case and he was permitted to do this in

response to a question which was not hypothetical and which stated no facts and which was based upon his hearing and observation of the testimony previously offered in the case.

It is true that on the witness' direct examination, occurring on the previous day, the witness was asked hypothetical questions; however, the testimony above quoted from the record conclusively shows that his opinion was not called for upon the facts enumerated in any previous hypothetical question but upon his hearing and observation of the testimony already offered in the case.

Almost without exception the authorities agree that the better if not the only proper method of eliciting the opinion of an expert witness is by means of a hypothetical question setting forth the facts established by the evidence in the case. This rule is well founded in reason as is stated by the Oregon Supreme Court in *Lippold* v. *Kidd* (1928), 126 Ore. 160, 269 Pac. 210, 59 A.L.R. 875, beginning at page 211 of the Pacific Reporter:

> " 'As an expert is not allowed to draw inferences or conclusions of fact from the evidence, his opinion should be exact upon a hypothetical statement of fact. It is the privilege of counsel to assume any state of facts which there is any testimony tending to prove, and to have the opinion of the expert based on the facts assumed. * * * '

> "Sound reason is the foundation for this requirement that the facts should be stated to the witness hypothetically. The expert witness is granted the privilege of expressing to the jury an opinion because his superior training enables him to arrive at a conclusion which is more likely to be sound than that of the average juror. But all opinions are based upon facts; generally the recipient of an opinion is at a loss to know what use he may advisedly make of an expert's opinion, unless he also knows what facts the expert took for granted when he formulated his conclusion. And it is equally necessary to the expert that, before he is required to express an opinion, he should be supplied with the necessary data. We see this exemplified in the daily affairs of life: A building contractor cannot safely submit a bid without detailed plans and specifications, and his bid is worthless to an owner, unless plans and specifications give the owner a detailed impression of the contemplated structure. The hypothetical question serves to the court and the jury the purpose of the plans and specifications."

The Idaho Supreme Court is in agreement as is shown by the following language in *Evans* vs. *Cavanagh* (1937), 58 Ida. 324, 73 P. (2d) 83, 85:

> "There is little or no conflict in the evidence other than in the testimony of medical experts.

> The testimony of an expert as to his opinion is not evidence of a fact in dispute, but is advisory, only, to assist the triers of fact to understand and apply the testimony of other witnesses. Its value depends on, among other things, the expert confining himself in his testimony to the facts incorporated in the question propounded to him, and if he does not assume these facts to be true and base his answer on them, his testimony is worthless and should be rejected. It is for the triers of fact to determine whether the evidence on which the expert bases his opinion is true or not. It is not for the expert to assume the responsibility of determining the truth or falsity—the reliability or unreliability, of the testimony of other witnesses. For this reason he should not be asked to base his opinion on the testimony of other witnesses which he has heard, but the facts which that testimony tends to establish, and which is relied on by the party propounding the question, should be hypothetically stated, and the testimony of the expert should be responsive to that question, and it is his duty to assume those facts to be true. Cochran v. Gritman, 34 Idaho 654, 203 P. 289; People v. McElvaine, 121 N.Y. 250, 24 N.E. 465, 466, 18 Am. St. Rep. 820; Dexter v. Hall, 15 Wall. 9, 21 L. Ed. 73."

Wigmore on Evidence, Third Edition (1940), Volume II, Section 672, page 792, states the accord

of that author with the general rule. Authorities on the point are legion; however, it is believed unnecessary to burden the Court with further references.

In some cases an expert witness has been permitted to give an opinion based upon the testimony of another witness or of several witnesses; however, even where that has been permitted, the rule has been limited to cases in which the testimony is brief, uncomplicated and not conflicting. The relaxation of the broad general rule is stated in 20 Am. Jur. Evidence, Section 789, page 662:

> "No. 789. *Testimony Overheard by Expert.*
>
> "The courts are not in accord upon the question of the right of an expert witness having no personal knowledge of the facts to give an opinion based upon the testimony of other witnesses which the expert has heard given. It is undoubtedly the better practice in such cases to incorporate in a hypothetical question the facts on which an expert witness is asked to give an opinion. Many statements are to be found which suggest that as a broad general rule, an expert cannot be allowed to base his opinion on the evidence which he has heard given in the case. According to the weight of authority, however, it is within the discretion of the trial court to permit an expert witness to give an opinion based upon the assumption of the truth of testimony which he has heard given by other wit-

> nesses without a hypothetical statement of the facts, where the witnesses are few, and the testimony is not voluminous, complicated, or conflicting. *In such cases, the question should be so framed that the jury will understand the exact facts upon which the witness bases his opinion.* It has been said that where testimony is brief and simple and especially where there is no contradictory evidence, to ask the expert to state his opinion, assuming the evidence given to be true, is equivalent to embodying the evidence in a hypothetical question." (Emphasis added).

Evidence in this case was introduced over a period of some eight days. It is believed safe to say that the evidence was complicated and in many instances conflicting.

Even in those jurisdictions and in those instances where experts have been permitted to give an opinion based upon the testimony or certain testimony in a case, almost universally, in addition to the requirement that the testimony be brief and uncontradicted, the courts have laid down these additional qualifications: (1) As is stated in 82 A.L.R. 1468:

> "With but few exceptions it has been held that where the opinion of an expert is asked on facts not detailed in the question itself, but the witness is referred to the testimony of another for such facts, *it should appear that the witness has heard the testimony.*" (Emphasis added).

and (2) The expert witness must be required by the question asked to assume the truth of the evidence (82 A.L.R. 1471).

It was not established that the witness Ryan was present and heard all or any part of the testimony in this case; also the witness was not required to assume as true all or any part of the testimony given. The witness was merely asked: "From your hearing and observation of the testimony already offered in this case, * * * . " This type of question points up the vice of deviating from the general rule and the recognized better practice. Here the witness, whether or not he was present and heard the testimony, and without being required to assume the truth of any testimony, was permitted to do that which in our judicial system is reserved to the triers of fact, that is, he was permitted to accept or reject all or any part of the testimony of any witness and he was permitted to draw his own inferences from some or any of the facts testified to by one or more of the witnesses; and, finally, he was permitted to express his positive and unqualified opinion on the fundamental and basic question in the entire case; namely, did the fire "emanate in or about the truck."

The admission of such testimony from any witness would be damaging, and it was particularly damaging and prejudicial when the circumstances are considered. This witness was the only expert who testified at the entire trial, his related experience and education held him out to be eminently

qualified. The jury was composed of the type of individuals, who in their business and personal living undoubtedly call upon, receive and rely upon the opinions of experts in their field, including civil engineers. It is difficult to imagine a conclusion of the defendants' case which could be more prejudicial to the plaintiff than the unequivocal statement made by the witness Ryan (when asked, "As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?"), "I can see no such possibility."

That the particular answer given was highly prejudicial to the plaintiff is borne out by the fact that, from the jury's note to the trial Court, it is apparent that the jury was particularly concerned over the proximate cause of the fire and who had the duty of explaining the exact cause. The witness was permitted to say in substance that he could see no possibility of a fire emanating in or about the truck without some outside agency, light or fire—the very issue which caused the jury so much concern. The admission of this testimony constitutes reversible error.

CONCLUSION

For the reasons stated, we submit that the trial Court should have granted plaintiff's motion for new trial and that the judgment and order appealed

from should be reversed and the cause remanded for a new trial.

Respectfully submitted,

ORVILLE R. WILSON
Residing at Elko, Nevada

R. P. PARRY

J. R. KEENAN

T. M. ROBERTSON

JOHN H. DALY
Residing at Twin Falls, Idaho.

Attorneys for Appellant.

TIMES-NEWS COM. PTG. DEPT.

No. 12,668

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD HERZINGER,
Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation, and E. J. ODERMATT,
Appellees.

BRIEF FOR APPELLEE STANDARD OIL COMPANY OF CALIFORNIA.

SAMUEL PLATT,
WALLACE L. KAAPCKE,
ALEXANDER R. IMLAY,
Standard Oil Building, San Francisco 4, California,
Attorneys for Appellee
Standard Oil Company of California.

MARSHALL P. MADISON,
FRANCIS R. KIRKHAM,
Standard Oil Building, San Francisco 4, California,
Of Counsel.

Table of Contents

Page

Statement as to jurisdiction 1

Statement of the case 1

Summary of argument 4

Argument 6

I. The trial court properly refused plaintiff's instruction No. 1 (refused) (R. 22a) in that it has no basis in the evidence and could only serve to mislead the jury. In any case, refusal of this instruction cannot be assigned as error, for failure to state at the trial the grounds of objection to the refusal..... 6

II. The court's "Explanation Requested by Jury of Instruction No. 22" as to the plaintiff's burden of proof under the rule of *res ipsa loquitur* could not have misled or confused the jury to appellant's prejudice. Here also, the giving of this explanatory instruction cannot be assigned as error, for failure to state at the trial the grounds of objection 13

A. Appellant could not have been prejudiced since he received the benefit of the doctrine of *res ipsa loquitur*, to which he was not entitled..... 13

B. The court's inclusion of the sentence, "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned," neither results in a conflict between Instructions No. 21 and No. 22, nor in any way increases the burden of proof which appellant was properly required to sustain, even under *res ipsa loquitur* 15

C. Not having objected to Instructions No. 21 or No. 22 at the trial, appellant cannot now be heard to claim that their effect was to confuse or mislead the jury 19

III. Even if *res ipsa loquitur* were applicable, the jury was not compelled to accept the inference of defendant's

Page

negligence and, in any event, adequate rebuttal evidence exists to sustain the verdict. The verdict therefore cannot be disturbed on appeal..... 20

IV. The trial court committed no error in permitting witness Ryan to testify concerning a fundamental issue of the case, since his answer was in response to a question which was properly based on facts to which plaintiff had made no previous objection..... 25

Conclusion 30

Table of Authorities

Cases	Page
Allegretti v. Murphy-Miles Oil Co. 363 Ill. 137, 1 N.E.2d 389	23
Anderson v. I.M. Jameson Corp. 7 Cal.2d 60, 59 P.2d 962	20
Armstrong v. Barcelous, 34 Cal.App. 433, 167 Pac. 895....	8
Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 143 P.2d 929	18
Bruening v. El Dorado Refining Co. 53 F.Supp. 356.....	14
Capital Transit Co. v. Jackson, 149 F.2d 839, cert.den. 326 U.S. 762	16
Century Indemnity Co. v. Arnold, 153 F.2d 531, cert.den. 326 U.S. 854	16
Donelly v. S. F. Bridge Co. 117 Cal. 417, 49 Pac. 559.....	8
Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53.....	20
Earle Restaurant v. O'Meara, 160 F.2d 275.....	19
Foltis, George, Inc. v. City of New York, 287 N. Y. 108, 38 N.E.2d 455	17
Fritsch v. Atlantic Refining Co. 307 Pa. 71, 160 Atl. 699..	23
George Foltis, Inc. v. City of New York, 287 N.Y. 108, 38 N.E.2d 455	17
Guerni Stone Co. v. Carlin, 240 U. S. 264	7
Highland Golf Club v. Sinclair Refining Co. 59 F.Supp. 911	14
Langhoop v. Richfield Oil Corporation of New York, 259 App.Div. 964, 21 N.Y.S.2d 416	14
Lefkoff v. Sicro, 189 Ga. 554, 6 S.E.2d 687, 133 A.L.R. 738	7
Lowmiller v. Monroe, Lyon & Miller, Inc. 101 Cal.App. 147, 281 Pac. 433, 282 Pac. 537	8
McCarthy v. Pennsylvania R. Co. 156 F.2d 877, cert.den. 329 U.S. 812	7
McCulloch v. Horton, 105 Mont. 531, 74 P.2d 1, 114 A.L.R. 823	7

Pages

Montgomery Ward & Co. v. Stevens, 60 Nev. 358, 109 P.2d 895 7
Mutual Benefit Health & Accident Ass'n. v. Francis, 148 F.2d 590 29

Nashville, C. & St. L. Ry. Co. v. York, 127 F.2d 606.....16, 21

Oettinger v. Stewart, 137 P.2d 852 18

Palmer v. Hoffman, 318 U. S. 109 ..... 6, 13
People v. Pacific Gas & Elec. Co. 27 Cal.App.2d 725..... 29
Peterson v. Betts, 24 Wash.2d 376, 165 P.2d 95..... 23

Rocona v. Guy F. Atkinson Co. 173 F.2d 661..... 21

Scarborough v. Urgo, 191 Cal. 341, 216 Pac. 584..... 16
Standard Oil Co. v. Gentry, 241 Ala. 62, 1 So.2d 29..... 8
Starks Food Markets v. El Dorado Refining Co. 156 Kan. 577, 134 P.2d 1102 14
Sweeney v. Erving, 228 U. S. 233 .....16, 21

Travelers Ins. Co. v. Drake, 89 F.2d 47..... 29

Ulm v. Moore-McCormack Lines, 115 F.2d 492, rehear.den. 117 F.2d 222, cert. den. 313 U.S. 567..... 29
Union Pac.R.Co. v. de Vaney, 162 F.2d 24..... 15
United Shoe Machinery Corporation v. Paine, 26 F.2d 594.. 7

Weaver v. Shell Co. 13 Cal.App.2d 643, 57 P.2d 571..... 14

Other Authorities

Federal Rules of Civil Procedure, Rule 51 ..... 6, 13

Restatement of Agency, secs. 265, 267 8

No. 12,668

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD HERZINGER,
Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation, and E. J. ODERMATT,
Appellees.

BRIEF FOR APPELLEE STANDARD OIL COMPANY OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

This appellee concurs in the jurisdictional statement contained in appellant's brief.

STATEMENT OF THE CASE.

Appellee Standard Oil Company of California* finds it necessary to make its own statement of certain aspects of the case in order to clarify appellant's statement (Br. 2-7).

*This appellee will hereinafter be referred to as "Standard."

The testimony of E. J. Odermatt shows that, under contract with Standard, he was an independent contractor engaged in business as a wholesale distributor of Standard Oil products throughout a certain territory in the vicinity of Wells, Nevada. Under express provision of the wholesale distributor agreement (Standard's Exh. A; identified R. 67; admitted R. 74; quoted R. 69) and in actual practice, Standard had no control over the manner in which he conducted his business (R. 69-73). The jury was properly instructed as to the legal test of control for determining whether he was in fact an independent contractor as distinguished from a servant (Instructions Nos. 15, 16; R. 34-37). The court refused a requested instruction (Plaintiff's Instruction No. 1 (Refused); R. 22a) based upon liability of a putative principal under a rule of ostensible agency, as there was no evidence of any representation by Standard that Odermatt was its servant, or of any reliance by appellant on any such representation.

The sequence of events leading up to the outbreak of the fire, according to the testimony of Nielson, the driver of Odermatt's truck, is more properly stated as follows: Upon his arrival at the plaintiff's premises, Nielson drove the truck beneath the canopy beside the inside storage tank (R. 406). There he stopped and shut off the motor (R. 409). Having measured both storage tanks, he next connected the delivery hose to the inside storage tank and drained all of one delivery tank on the truck and part of another (R. 410). Having filled the inside tank, Nielson disconnected and drained the delivery hose, moved the truck to the outside storage tank, shut off the motor and commenced delivery there (R. 410-414). While the gas-

oline was draining into the outside storage tank, Nielson entered the bar briefly to purchase a soft drink and returned to the truck (R. 418-419, 440-441). He stayed next to the truck during the remainder of the delivery, which was completed without incident, shifting the hose to another delivery tank on the truck when the first had been exhausted (R. 415). *After delivery, he disconnected, drained and laid the hose down next to the pump block* and reentered the bar for the purpose of filling out the invoice. Before this was accomplished, flames were suddenly noticed up under plaintiff's canopy, which extended out from his building over the gas pump (R. 422).

Appellant's statement of facts, based on Moseley's and Klitz's testimony, appears to indicate that Nielson returned to the bar immediately after moving the truck and was still in the bar when the fire broke out (Br. 4). That this is quite impossible is borne out by the fact that in order to fill the outside storage tank, the contents of more than one delivery tank on the truck were required: how the hose could switch from one delivery tank to another to accomplish this, appellant has failed to explain.

As appellant states, both Standard and Odermatt moved for a directed verdict at the close of plaintiff's case on the ground that the evidence failed to establish negligence and the proximate cause of the fire.* Deeming the doctrine of *res ipsa loquitur* applicable, the court denied these motions.

Defendants then introduced evidence showing that the fire was not caused by any negligence on the part of the

*Standard made a separate motion not pertinent to the appeal.

driver of the truck. Defendants also showed there were numerous instrumentalities under appellant's own control that might have caused the fire (see argument, *infra*).

Among the defense witnesses was Jacob Ryan, who testified as an expert on the characteristics and inflammability of petroleum products (R. 498-513). It is not correct, as appellant states (Br. 6), that this witness answered any question based on his hearing and observation of the testimony in the case. An objection to one such question was sustained and the question was not answered (R. 522).

There are discussed in the argument herein the questions suggested in appellant's statement of the case regarding the court's "Explanation Requested by Jury of Instruction No. 22" (R. 23-25).

SUMMARY OF ARGUMENT.

I. The trial court properly refused Plaintiff's Requested Instruction No. 1 (Refused) (R.22a) in that it has no basis in the evidence and could only serve to mislead the jury. In any case, refusal of this instruction cannot be assigned as error, for failure to state at the trial the grounds of objection to the refusal.

II. The court's "Explanation Requested by the Jury of Instruction No. 22" (R.23) as to the plaintiff's burden of proof under the rule of *res ipsa loquitur* could not have misled or confused the jury to appellant's prejudice. Here also, the giving of this explanatory instruction cannot be assigned as error, for failure to state at the trial the grounds of objection.

A. Appellant could not have been prejudiced since he received the benefit of the doctrine of *res ipsa loquitur,* to which he was not entitled.

B. The court's inclusion of the sentence, "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned," neither results in a conflict between Instructions No. 21 and No. 22, nor in any way increases the burden of proof which appellant was properly required to sustain, even under *res ipsa loquitur.*

C. Not having objected to Instructions No. 21 or No. 22 at the trial, appellant cannot now be heard to claim that their effect was to confuse or mislead the jury.

III. Even if *res ipsa loquitur* were applicable, the jury was not compelled to accept the inference of defendant's negligence and, in any event, adequate rebuttal evidence exists to sustain the verdict. The verdict therefore cannot be disturbed on appeal.

IV. The trial court committed no error in permitting witness Ryan to testify concerning a fundamental issue of the case, since his answer was in response to a question which was properly based on facts to which plaintiff had made no previous objection.

ARGUMENT.

I. **THE TRIAL COURT PROPERLY REFUSED PLAINTIFF'S INSTRUCTION NO. 1 (REFUSED) (R. 22a) IN THAT IT HAS NO BASIS IN THE EVIDENCE AND COULD ONLY SERVE TO MISLEAD THE JURY. IN ANY CASE, REFUSAL OF THIS INSTRUCTION CANNOT BE ASSIGNED AS ERROR, FOR FAILURE TO STATE AT THE TRIAL THE GROUNDS OF OBJECTION TO THE REFUSAL.**

Appellant's first specification of error is the trial court's refusal to give Plaintiff's Requested Instruction No. 1 (Refused) (R.22a). Appellant failed to object specifically to the court's refusal to give appellant's requested instruction, contenting himself with a general exception without a statement of his grounds (R. 537). For such failure he cannot now assign as error the refusal to give this instruction to the jury. It is clear that only where the trial court is advised specifically of the grounds of objection to a refusal to give an instruction can such refusal be assigned as error.

Rule 51, Fed. Rules Civ. Proc.;

Palmer v. Hoffman (1943) 318 U.S. 109, 119.

Although appellant is thus precluded from urging his objection here, we shall consider the merits of his contention. Each of the cases cited by appellant in support of this specification of error (Br. 12-15) stands for the principle that it is error to refuse a requested instruction when it is *both* a correct statement of the law *and* is applicable to the case. These cases simply emphasize the fundamental defect in appellant's position: the lack of any evidence in the record which could possibly sustain the instruction.

It is clear that the court may refuse any instruction which states no principle of law that can materially aid the jury in arriving at its decision (*Lefkoff v. Sicro* (1939) 189 Ga. 554, 6 S.E. 2d 687, 133 A.L.R. 738), which might mislead the jury (*Guerni Stone Co. v. Carlin* (1916) 240 U.S. 264), or which lacks substantial basis in the evidence (*United Shoe Machinery Corporation v. Paine* (1928) 26 F.2d 594; *McCarthy v. Pennsylvania R. Co.* (7 Cir. 1946) 156 F.2d 877, certiorari denied (1947) 329 U.S. 812; *McCulloch v. Horton* (1937) 105 Mont. 531, 74 P.2d 1, 114 A.L.R. 823). The instruction requested by appellant would in no way assist the jury, could easily mislead them, and fails in any respect to apply to the evidence.

The legal principle embodied in appellant's refused instruction would impose liability on a party for the harm caused by another who is not in fact a servant, where the putative principal has nevertheless *represented* that the actor is his servant, thereby causing the plaintiff *justifiably* to *rely* upon the care or skill of the actor. In the case cited by appellant as authority for this legal principle (*Montgomery Ward & Co. v. Stevens* (1941) 60 Nev. 358, 109 P.2d 895), the facts showed that the defendant, Montgomery Ward & Co., represented to the plaintiff that the actor was its servant and that he was a capable individual, and showed the plaintiff's reliance on such representations, to his injury. The court stressed the requirement of both representation and reliance for the imposition of liability.

Authority elsewhere is in accord in requiring proof of both representation and reliance as the essential ingredients for establishing an ostensible agency in tort actions.

Donelly v. S. F. Bridge Co. (1897) 117 Cal. 417, 49 Pac. 559;

Lowmiller v. Monroe, Lyon & Miller, Inc. (1929) 101 Cal.App. 147, 281 Pac. 433, 282 Pac. 537;

Armstrong v. Barceloux (1917) 34 Cal.App. 433, 167 Pac. 895;

Standard Oil Co. v. Gentry (1941) 241 Ala. 62, 1 So. 2d 29;

Restatement of Agency, secs. 265, 267.

Section 265 of the Restatement of Agency strongly states the requirement of reliance:

> "Except where there has been reliance by a third person upon the appearance of agency, one who has manifested that another is his servant or other agent does not thereby become liable for the other's tortious conduct, although it is apparently authorized or is within the apparent scope of employment."

Nowhere in the record in this case is there any indication that Standard represented in either word or deed to appellant that Odermatt, the wholesale distributor of its products, was Standard's servant or agent, nor in any way made any representation as to his care or skill; nor does the evidence indicate any reliance by appellant upon any such representation. On the contrary, as later discussed (infra, pp. 10-12), the evidence affirmatively shows knowledge by appellant that Odermatt was not the servant or agent of Standard.

Appellant's argument simply assumes that the essential requirements of representation and reliance exist. Appellant makes passing references to the record without any explanation (Br. 14). Analysis of these references shows they do not support his contention.

The references to pages 3, 9 and 18 of the record merely allude to the contested allegations of agency in the pleadings. Pages 259-262 of the record show only appellant's testimony that he had been selling products of Standard under a dealer agreement with it. He gave no testimony whatever concerning any representation by Standard as to Odermatt's status or his skill or care. The dealer agreement itself (Pl. Exh. 10) which was identified by appellant during this testimony, discloses simply an agreement by Standard to sell and deliver petroleum products to appellant. The agreement is silent as to the means or instrumentalities by which the delivery should be made. It cannot be inferred from such agreement that delivery was to be made by an employee; for in ordinary commercial intercourse delivery of products that a seller has contracted to supply to a buyer is commonly made through an independent contractor such as rail or other common carrier, a parcel delivery service, a local express service, and even through the Post Office Department of the United States Government. There is nothing in the record to show that practice in the petroleum industry is different in any way from ordinary commercial practice.

Moreover, the dealer agreement (Pl. Exh. 10, par. 11) discloses appellant's recognition of his own status as an

independent contractor in his business as a retail distributor of Standard products. Appellee Odermatt is simply a distributor at the wholesale level of distribution. Appellant, whose own contract contains his recognition that he was an independent contractor, must have been aware that distributors at the wholesale level of distribution might well occupy the same status.

Appellant further referred to pages 301-302 where he identified plaintiff's exhibits 1 to 4 as representing the typical documents involved in the business transactions between himself and the manufacturer of the petroleum products he sold. He testified to no facts indicating the existence of, or any reliance upon, statements or conduct of Standard as to the employee status of the distributor delivering these products. These exhibits themselves reveal no such representation by Standard. Plaintiff's exhibit 1, the invoice for petroleum products delivered, naturally bears the name of Standard since it was the seller of the products and payment for the products was due to it. Naturally also, the invoice was signed by the distributor's employee Nielson who, as the person actually making the delivery, is the only one to sign such an invoice.

Plaintiff's exhibit 2 is an acknowledgment for delivery receipts given by appellant to the person who brought the gasoline to his premises. Such delivery receipts, evidencing appellant's sales to holders of Standard's credit cards, were accepted by Standard in lieu of cash in payment for the petroleum products delivered (R. 301). Plaintiff's exhibit 4 is a receipted invoice for appellant's payment to Standard of rent for the pumps and tanks

owned by it. Of course, these forms (Pl. Exh. 2, 4) bear Standard's name since they relate to financial incidents of the business relationship between Standard as a seller, and appellant as a buyer and a retail distributor of petroleum products. That these forms were signed by Odermatt, the wholesale distributor, is without significance. This indicates merely that Odermatt, the wholesale distributor, had been authorized by Standard to handle money matters incident to his making delivery of petroleum products. From such authority no conclusion can be drawn that Odermatt either did or did not stand in the relationship of servant to Standard.

Plaintiff's exhibit 3 is nothing more than a cancelled check given by appellant and payable to Standard in payment for petroleum products. This shows nothing as to the status of Odermatt.

Thus there is nowhere in the portions of the record referred to by the appellant, or elsewhere, any indication of a representation by Standard that Odermatt was its employee, or any reliance by appellant on any representation. The record does show knowledge by appellant of Odermatt's status as an independent contractor. Plaintiff's exhibit 27 is a picture of the tank truck used by Odermatt for delivering petroleum products to appellant's premises (R. 524). The name of Standard, or any of its products, does not appear on the truck. There is prominently displayed upon the right door of the truck's cab the legend:

"E. J. Odermatt
Wholesale Distributor
Wells, Nev."

Moreover, the evidence shows that while appellant, by check payable to Standard, paid for petroleum products at the Wells, Nevada, price, separate payments were made to and retained by Odermatt at the rate of 2 cents per gallon representing the differential for delivery from Wells, Nevada, to appellant's premises at Contact, Nevada (R. 72-73). Separate compensation by appellant to Odermatt for the delivery differential is wholly incompatible with any possible assumption by appellant that Odermatt was acting otherwise than as an independent businessman. In addition, appellant's manager Mr. Moseley (R. 86) recognized Odermatt's independent status. He testified the petroleum products for appellant's premises, products manufactured by Standard, were procured from Mr. Odermatt (R. 87-88). This is not the language of one dealing with a mere employee of the oil company.

We submit that upon this record the refused instruction has no foundation in the evidence, would not have aided the jury in arriving at its decision, and could only have misled the jury. The instruction was properly refused. In any event, as first above stated, its refusal cannot be assigned as error.

II. THE COURT'S "EXPLANATION REQUESTED BY JURY OF INSTRUCTION NO. 22" (R. 23) AS TO THE PLAINTIFF'S BURDEN OF PROOF UNDER THE RULE OF RES IPSA LOQUITUR COULD NOT HAVE MISLED OR CONFUSED THE JURY TO APPELLANT'S PREJUDICE. HERE ALSO THE GIVING OF THIS EXPLANATORY INSTRUCTION CANNOT BE ASSIGNED AS ERROR, FOR FAILURE TO STATE AT THE TRIAL THE GROUNDS OF OBJECTION.

A. Appellant could not have been prejudiced since he received the benefit of the doctrine of res ipsa loquitur, to which he was not entitled.

Appellant complains of error committed by the court in explaining to the jury the nature of the burden of proof required of a plaintiff in a case involving the doctrine of *res ipsa loquitur*. Appellant at the trial took only a general exception to one sentence in this explanation (R. 537). His grounds for objection were not stated, and he is therefore precluded from assigning as error the giving of this explanatory instruction.

Rule 51, Fed. Rules Civ. Proc.;

Palmer v. Hoffman (1943) 318 U.S. 109, 119.

To discuss the details of appellant's contention: By reason of the trial court's application of the doctrine of *res ipsa loquitur* (Instruction No. 22, R. 41-42), appellant's case was submitted to the jury under instructions far more favorable than those to which appellant was actually entitled. Appellant therefore could not have been prejudiced by an instruction which imposed on him a burden of proof no more onerous than that which he properly bore, namely, the burden of proving by a preponderance of the evidence that there was negligence of the defendants and that such negligence was the proximate cause of the plaintiff's damage.

The doctrine of *res ipsa loquitur* does not apply to a fire arising from delivery of gasoline upon the plaintiff's premises, since it is clear that the inference of negligence cannot arise unless all the possible causes of the accident are within the control of defendant.

Weaver v. Shell Co. (1936) 13 Cal.App.2d 643, 57 P.2d 571;

Langhoop v. Richfield Oil Corporation of New York (1940) 259 App.Div. 964, 21 N.Y.S.2d 416;

Starks Food Markets v. El Dorado Refining Co. (1943) 156 Kan. 577, 134 P.2d 1102;

Bruening v. El Dorado Refining Co. (W.D.Mo. 1943) 53 F.Supp. 356.

Under circumstances remarkably similar to those involved in the present case, the California Supreme Court in *Weaver v. Shell Co.,* supra, stated that *res ipsa loquitur* could not properly apply to a fire of unknown origin arising during the delivery of gasoline from the defendant's truck at the plaintiff's premises, since the nature of the accident fails to exclude all inferences as to the cause of the fire except the defendant's negligence. Also under similar circumstances, the United States District Court for the Northern Division of Iowa, holding *res ipsa loquitur* inapplicable, stated that the *res ipsa loquitur* situation most commonly arises where the *plaintiff* is injured on the premises of the *defendant;* in the gasoline delivery cases, the reverse is normally true, making it inappropriate to apply the doctrine.

Highland Golf Club v. Sinclair Refining Co. (N.D. Iowa 1945) 59 F.Supp. 911.

It is clear that appellant received the advantage of a doctrine to which he was not entitled under the facts. It is likewise clear that the court's explanation of Instruction No. 22 could not have prejudiced appellant.

B. The court's inclusion of the sentence, "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned," neither results in a conflict between Instructions No. 21 and No. 22, nor in any way increases the burden of proof which appellant was properly required to sustain, even under res ipsa loquitur.

If, *arguendo,* the doctrine of *res ipsa loquitur* were applicable in this case, the court's explanation to the jury (R. 23-25) nevertheless correctly states appellant's burden of proof under that doctrine.

Appellant appears to be under the impression that the shifting of the burden of going forward with the evidence, which is generally conceded to be the procedural effect of *res ipsa loquitur,* results somehow in altering the main burden of proof imposed upon the plaintiff in a negligence action.* Such a conclusion could only result from a misunderstanding of the effect of the doctrine of *res ipsa loquitur.* In *Union Pac.R. Co. v. De Vaney* (9 Cir. 1947) 162 F.2d 24, this court has recently recognized the proper rule, that the burden of proof of both negligence and proximate cause remains with the plaintiff throughout the case (p. 26):

> "Appropriately we may add that the burden of proving this case always remains with plaintiff as, even

*In Instruction No. 22 (R. 41-42) and in the court's explanation thereof to the jury (R. 23-24) it was made clear to the jury that the defendants had the burden of going forward with the evidence.

> with the aid of the doctrine, the plaintiff continues under the duty of convincing the fact finder that the injury resulted from negligence and the defendant was guilty of the negligence."

This rule has been adopted by the United States Supreme Court in *Sweeney v. Erving* (1913) 228 U.S. 233, where the court quoted with approval the following language (p. 241):

> "Whether the defendant introduces evidence or not, the plaintiff in this case will not be entitled to a verdict unless he satisfies the jury by the preponderance of the evidence that his injuries were caused by a defect in the elevator attributable to the defendant's negligence."

The same rule was applied in these recent decisions:

Century Indemnity Co. v. Arnold (2 Cir. 1946) 153 F.2d 531, certiorari denied (1946) 326 U.S. 854;

Capital Transit Co. v. Jackson (App. D.C. 1945) 149 F.2d 839, certiorari denied (1945) 326 U.S. 762.

In the case of *Nashville, C. & St. L. Ry. Co. v. York* (6 Cir. 1942) 127 F.2d 606, the court specifically approved of an instruction which directed that, in order to find for the plaintiff, the jury must find that the plaintiff has shown by a preponderance of the evidence that the defendant's negligence was the proximate cause of the defendant's injury, even where *res ipsa loquitur* applies.

The courts of California, which appellant has cited as authority to sustain his contention, are in accord with the rule just mentioned. Thus, in *Scarborough v. Urgo* (1923)

191 Cal. 341, 216 Pac. 584, the California Supreme Court stated (p. 349):

> "Each of the following cases also holds, either expressly or by necessary implication that, where the court gives an instruction embodying the doctrine of *res ipsa loquitur,* it should also give one to the effect that the burden of proving his case by a preponderance of the evidence rests upon the plaintiff. (*Cody v. Market St. Ry. Co., supra; Valente v. Sierra Ry. Co.,* 151 Cal. 534, 537 [91 Pac. 481]; *Patterson v. San Francisco etc. Ry. Co., supra; Bonneau v. North Shore R. R. Co., supra; Wyatt v. Pacific Elec. Ry. Co.,* 156 Cal. 170, 175 [103 Pac. 892]; *Diller v. Northern California Ry. Co.,* 162 Cal. 531, 537 [Ann. Cas. 1913D, 908, 123 Pac. 359]; *Slaughter v. Goldbery, Bowen & Co.,* 26 Cal. App. 318, 328 [147 Pac. 90]; *Weaver v. Carter,* 28 Cal. App. 241, 247 [152 Pac. 323].)"

In a very well reasoned opinion, Chief Judge Lehman of the New York Court of Appeals in *George Foltis, Inc. v. City of New York* (1941) 287 N.Y. 108, 38 N.E.2d 455, pointed out that *res ipsa loquitur* does not mean that the plaintiff can recover without sustaining the burden of proving negligence by a fair preponderance of the evidence (p. 459):

> "In such circumstances the doctrine of res ipsa loquitur relieves a plaintiff from the burden of producing direct evidence of negligence, but it does not relieve a plaintiff from the burden of proof that the person charged with negligence was at fault."

As the reasoning of this opinion indicates, *res ipsa loquitur* affects only the *means* of proof, that is, circum-

stantial as distinguished from direct evidence, rather than the *burden* of proof, that is, by a fair preponderance of the evidence.

Nor is there validity to appellant's contention that there is a conflict between Instructions No. 21 and No. 22. In arguing a conflict, appellant cites *Oettinger v. Stewart* (1943) 137 P.2d 852 (not officially reported), and *Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 143 P.2d 929. Neither of these cases involved a situation like the instant one, in which there were at least nine separate instrumentalities under appellant's own control that may have caused the fire (infra, pp. 26-27). Before *res ipsa loquitur* could serve to raise an inference of negligence under any theory, it was necessary for the jury to conclude that these instrumentalities were not causative factors. In such circumstances, it would be preposterous to say that the mere fact the fire happened, considered alone, would support an inference of negligence. The court properly and necessarily instructed that the mere happening of the fire, *considered alone,* did not support such an inference (Instruction No. 21, R. 40-41); and further instructed that *if* the jury found the instrumentalities under appellant's control did not cause the fire, *then* an inference of negligence arose, which must be rebutted by defendants (Instruction No. 22, R. 41-42).

The Court of Appeals for the District of Columbia has recently held:

> "We find no error in the other respects in which appellant asserts error. The instruction as to the inference of negligence is perhaps inartistic as it

appears on the printed record. In effect, however, the court said that the evidence was sufficient to justify an inference of negligence if the jury believed the evidence and determined that the inference was warranted; it specifically said that no presumption of negligence whatever arose from the mere happening of the accident'' (*Earle Restaurant v. O'Meara* (App. D.C. 1947) 160 F.2d 275, 278).

C. Not having objected to Instructions No. 21 or No. 22 at the trial, appellant cannot now be heard to claim that their effect was to confuse or mislead the jury.

We have shown that the Explanation appended by the trial court to Instruction No. 22 is a correct statement of the law and in no way altered or affected the burden of proof which the instruction itself properly imposed upon appellant. The instruction clearly states that a verdict for the plaintiff may be warranted if the inference ''that the proximate cause of the occurrence in question was some negligent conduct on the part of the defendant'' preponderates over contrary evidence, or if there exists no contrary evidence. The portion of the Explanation to which the appellant objects states no more than this, despite his contention that the Explanation had the effect of ''changing'' the burden of proof.

This being the case, appellant's objection to the Explanation amounts to nothing more than a belated attempt to object to instructions to which he had previously assented. Appellant will not now be heard to offer an objection not made at the trial by the device of objecting to an Explanation which in no way altered, amended or modified the effect of the instruction to which it refers.

Nor can the giving of this explanation to the jury be assigned as error at all, as appellant did not at the trial state his grounds for objection.

III. EVEN IF RES IPSA LOQUITUR WERE APPLICABLE, THE JURY WAS NOT COMPELLED TO ACCEPT THE INFERENCE OF DEFENDANT'S NEGLIGENCE AND, IN ANY EVENT, ADEQUATE REBUTTAL EVIDENCE EXISTS TO SUSTAIN THE VERDICT. THE VERDICT THEREFORE CANNOT BE DISTURBED ON APPEAL.

Appellant cites several decisions by the courts of California to the effect that where *res ipsa loquitur* has been applied to a case, the inference which arises in the plaintiff's favor is one which cannot arbitrarily be dismissed by the jury but must be weighed and considered against the evidence presented by the defendant. The relative weight which the jury shall give to the inference still depends upon the probative strength of the facts which give rise to it, the right and duty of the jury being "to draw such reasonable inferences from the evidence as may appeal to and satisfy their minds" *(Anderson v. I. M. Jameson Corp.* (1936) 7 Cal.2d 60, 66, 59 P.2d 962). In one of the cases cited by appellant in support of his contention, *Druzanich v. Criley* (1942) 19 Cal.2d 439, 122 P.2d 53, the California Supreme Court said (pp. 444-445):

> "The application of the doctrine does not give a plaintiff an absolute right to a judgment in every case. *(Raymer v. Vandenbergh,* 10 Cal. App. (2d) 193 [51 Pac. (2d) 104]; *Nicol v. Geitler,* 188 Minn. 69 [247 N. W. 8]; *Sweeney v. Erving,* 228 U. S. 233 [33 Sup. Ct. 416, 57 L. Ed. 815].) It does not shift the burden

> of proof, and when the defendant produces evidence to rebut the inference of negligence, it is ordinarily a question of fact whether the inference has been dispelled. *(Anderson v. I. M. Jameson Corp.,* 7 Cal. (2d) 60 [59 Pac. (2d) 962]; *Scarborough v. Urgo,* 191 Cal. 341 [216 Pac. 584] * * *.)''

It is one thing to contend that a jury may not arbitrarily disregard pertinent evidence having an inherent probative character, whether the evidence be direct or circumstantial; it is quite another thing to contend that a certain inference, once established, *compels* the jury to a specific verdict. In *Rocona v. Guy F. Atkinson Co.* (9 Cir. 1949) 173 F.2d 661, this court recently applied the rule of *Sweeney v. Erving* (1913) 228 U.S. 233, which states that if an inference of negligence arising out of *res ipsa loquitur* is justified it will *support,* but not *require,* a finding of negligence. In *Nashville, C. & St. L. Ry. Co. v. York* (6 Cir. 1942) 127 F.2d 606, the Court of Appeals for the Sixth Circuit stated that the circumstantial evidence arising out of the inference ''must be weighed, but not necessarily accepted as sufficient; that explanation or rebuttal is called for, though not necessarily required; that a case for the jury is made, though the jury verdict is not forestalled; that the defendant's general issue is not converted into an affirmative defense * * *'' (p. 608).

It is clearly within the province of the trier of facts to determine the relative weight of the evidence presented by both parties. Appellant here challenges that the evidence presented by defendants is insufficient to overcome the inference of negligence, to which appellant claims

he is entitled by the facts of this case. If *res ipsa loquitur* were applicable, the evidence effectively rebuts any inference that any negligence of Nielson was the proximate cause of the fire.

The testimony of Nielson amply shows that he did exercise reasonable care under the circumstances while delivering the gasoline. Prior to the delivery of gasoline to each storage tank the truck motor was shut off (R. 409-413). Each time that he connected the delivery hose to the supply tank, Nielson was careful to use the wrench in tightening the connection as a precaution against spillage (R. 414, 415). Upon completion of the delivery of gasoline into each storage tank, he elevated the hose in order that it might drain completely (R. 410-415). Any alleged negligence arising from the fact that Nielson entered the barroom while the outside storage tank was being filled could have no bearing upon the cause of the fire, since the fire did not start until at least fifteen minutes had elapsed (R. 441) after he returned to the truck. During that time delivery was completed, and the hose was disconnected from the truck and drained (R. 416). The court's Instruction No. 23 (R. 43) gave the jury ample opportunity to consider Nielson's absence as negligence. The verdict is sufficient demonstration that any such conduct was *not* the proximate cause of the fire.

Appellant raises in passing (Br. 27) one other suggested basis for negligence of Nielson: the lack of testimony that he made any determination there were no sources of ignition present during the delivery of gasoline. The only possible sources of ignition suggested by any evidence in the record are the exhaust pipe of the truck

and the numerous instrumentalities under the plaintiff's own control upon his premises. The motor of the truck could not have been a source of ignition as it was turned off during the delivery of the gasoline (R. 409-413). The testimony of the witness Ryan excludes the truck's exhaust pipe as a source of ignition (R. 503-505), as ordinary common sense would exclude it, in view of the time that had elapsed between the arrival of the truck at plaintiff's premises and the occurrence of the fire. The motors operating the gasoline pumps were excluded, since they were covered (R. 169) and, in any event, were kept switched off except when gasoline was actually being dispensed through the pumps (R. 169-170). Defendant's evidence also negatived any possibility of spontaneous combustion (R. 501).

This suggestion of negligence—if indeed it be seriously made by appellant—amounts then to an assertion that it was Nielson's duty minutely to inspect the premises of plaintiff each time he made a delivery of gasoline and ascertain that nowhere on those premises was any device that could possibly ignite gasoline vapor. The existence of any such duty would mean that the business of delivering gasoline could not be carried on. That there is no such duty is well established.

Fritsch v. Atlantic Refining Co. (1932) 307 Pa. 71, 160 Atl. 699;

Allegretti v. Murphy-Miles Oil Co. (1936) 363 Ill. 137, 1 N.E. 2d 389;

Peterson v. Betts (1946) 24 Wash. 2d 376, 165 P. 2d 95.

In *Peterson v. Betts,* supra, a fire was caused at a service station by the ignition of gas fumes by defective electric wiring on the premises. In support of a judgment for the plaintiff against the oil company it was argued, as here, that the driver of the truck should have known that spilled gasoline would reach a vault on the premises where there was a defectively wired compressor. Reversing the judgment for the plaintiff, the court said, at page 104 (165 P. 2d 95, 104):

> "If it is meant by this that it was the corporation's duty to inspect the premises before making delivery of gasoline, the answer is, it had no such duty."

There is also no lack of evidence indicating a very logical cause of the fire. By a very reasonable hypothesis, the jury could assemble the following factors into a picture explaining the fire's origin. Appellant's manager Ross Moseley testified that immediately prior to the fire a wind was blowing from the southwest (R. 105, 111, 140, 141), or from the direction of the truck, toward the door of the grocery store (Pl. Exh. 6, R. 140, 141). The gas fumes dispelled through the vent pipe on the outside storage tank (R. 502) are heavier than air (R. 515, 516), and could easily have partially settled from under the canopy and blown in through this door and against the pilot light of the kerosene refrigerator. Whether this refrigerator was in operation at the time of the fire or whether it was not is a matter of conflicting evidence. Witness Warner testified that on the morning following the fire he looked inside the refrigerator and saw the remains of cooked meat (R. 483, 485). This evi-

dence is corroborated by the testimony of Moseley who admitted that he saw the same thing (R. 117, 160, 161). The presence of meat in the refrigerator would certainly justify the jury in concluding that the refrigerator *was* in operation at the time of the fire.

This hypothesis is strengthened by Nielson's testimony that he first saw flames under the overhead canopy (R. 422), which could easily be explained by a flash back from an ignition within the grocery store (R. 509). If the kerosene refrigerator were not in operation, there were numerous other appliances of appellant that could have served as the source of ignition (infra, pp. 26-27).

It is submitted that more than sufficient evidence was introduced, both as to the proper care exercised by Nielson and as to a reasonable explanation of the origin of the fire from a cause other than any negligence of Nielson, to rebut any inference that Nielson's negligence was the proximate cause of the fire. At the very least, under the authorities above cited, the jury was entitled to weigh this evidence against the inference, and its verdict, having a reasonable basis, cannot be disturbed on appeal.

IV. THE TRIAL COURT COMMITTED NO ERROR IN PERMITTING WITNESS RYAN TO TESTIFY CONCERNING A FUNDAMENTAL ISSUE OF THE CASE, SINCE HIS ANSWER WAS IN RESPONSE TO A QUESTION WHICH WAS PROPERLY BASED ON FACTS TO WHICH PLAINTIFF HAD MADE NO PREVIOUS OBJECTION.

Appellant assumes throughout his argument on point IV of his Specification of Errors that the question to

which he objects is not a hypothetical question. He assumes further that "the record conclusively shows" that the question was improperly based upon witness Ryan's "hearing and observation of the testimony already offered in the case" (Br.34). This latter assumption is apparently drawn from the fact that a prior question asked the witness to base an opinion upon "your hearing and observation of the testimony already offered in this case" (R.522). An objection to this question was sustained by the court (R.522) and the question was not answered. Appellant suggests that counsel for Standard framed the very next question on the same basis, which the court had already found to be erroneous. Such an assumption does violence to the plain meaning of the question and, we submit, attempts to give this court an impression of the question and answer based on lifting them out of the context in which they properly belong. This context was in the minds of the jury during the trial and for proper consideration by this court should be set forth at this point.

The record amply bears out the fact that the question objected to is simply one of a series of at least six questions, asked of witness Ryan, relating to possible causes of the fire. Appellant had been unable to establish the cause and defendants had introduced evidence from which the jury could conclude that the fire had been caused by some instrumentality on the plaintiff's premises. The possibilities included the pilot light of the kerosene refrigerator (R.140), defective panorama movie machine (R.212-214), butane hot water tank in the basement (R.343), pilot light on a butane stove

(R.372-373), electric wiring (R.125), power plant (R.125), motor for the barroom refrigerator (R.373), motor in the music machine (R.373-374) and motor in the basement for the beer box (R.374).

Expert witness Ryan was first questioned to determine whether spontaneous combustion could have caused the fire (R.501). The answer was in the negative. He was then asked whether an open flame would ignite gasoline vapors, to which the witness replied in the affirmative (R.501). Next the witness was asked to assume certain hypothetical facts based upon the evidence and to state whether the exhaust pipe of the truck would ignite gasoline vapors. The response was in the negative (R.502-505). Assuming the same hypothetical facts and, in addition, the presence of flames under the canopy, the witness next stated that the vapor on top of the truck would be ignited. An objection by plaintiff to this question was first made and subsequently withdrawn (R.507-508). The fifth question assumed the same truck and conditions as before, and asked whether a pilot light burning within the doorway could ignite the vapor. The witness replied in the affirmative. No objection was raised to the question or answer, but an explanatory statement of the witness was subsequently stricken (R. 509, 510). After objection was sustained to a question based on the witness's hearing and observation of the testimony, the final question on this subject, and the one of which appellant now complains, was: "As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?" (R.522). It should be noted that the witness

had already testified, without objection, to substantially the same effect (R.501):

> "Q. In other words, as I understand it, in order to ignite gasoline or gasoline vapors, it would be necessary that an outside agency of fire come in contact with the vapor or the gasoline?
>
> A. Well, heat in some form; we will say a flame or a spark or a hot surface.
>
> Q. A hot surface?
>
> A. That's right.
>
> Q. But outside of those three outside agencies, gasoline or the vapors would not ignite?
>
> A. That is correct."

Also, the witness had already testified in answer to a hypothetical question based upon the evidence that the exhaust pipe of the truck would not ignite gasoline vapors (R.502-505); and the evidence is that the truck's motor was not running (R.413).

It is true that in the body of the question, of which appellant now complains, all the facts creating the hypothesis are not stated. But the previous questions, which elicited the expert knowledge of the witness, had incorporated facts based upon evidence in the record. Clearly there was no need to repeat them here. The question was cumulative and by way of summary of those going before and not objected to. The jury unquestionably understood the nature of the question and the hypothetical facts upon which it and the preceding questions answered by the witness were based. They were entitled to the benefit of the expert witness's opinion on the subject.

Under the circumstances, if counsel for appellant had believed at the trial that the answer to this question would be confusing to the jury or prejudicial to his client, he could easily have inquired extensively on recross examination into the basis of the witness's answer.

People v. Pacific Gas & Elec. Co. (1938) 27 Cal. App.2d 725, 81 P.2d 584;

Ulm v. Moore-McCormack Lines (2 Cir.1940) 115 F.2d 492, rehearing denied 117 F.2d 222, certiorari denied 313 U.S. 567.

Appellant remained silent, however, on recross examination except to inquire about the flash point of gasoline (R.523).

Appellant appears to have objection to the fact that the question called for a "positive and unqualified opinion on the fundamental and basic question in the entire case" (Br.39). It is not objectionable that a question seeks an expert's testimony concerning the fundamental issue of a case.

Travelers Ins. Co. v. Drake (9 Cir.1937) 89 F.2d 47;

Mutual Benefit Health & Accident Ass'n. v. Francis (8 Cir.1945) 148 F.2d 590.

Finally, there could have been no prejudice to appellant in view of the court's instruction fully explaining the jury's right to reject evidence of expert opinion (Instruction No. 20, R.39-40):

> "The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and

experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound."

CONCLUSION.

We respectfully submit the judgment below should be affirmed.

Dated, San Francisco, California,
March 1, 1951.

Respectfully submitted,
SAMUEL PLATT,
WALLACE L. KAAPCKE,
ALEXANDER R. IMLAY,
Attorneys for Appellee
Standard Oil Company of California.

MARSHALL P. MADISON,
FRANCIS R. KIRKHAM,
Of Counsel.

No. 12,668

United States Court of Appeals

For the Ninth Circuit

EDWARD HERZINGER,
Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT,
Appellees.

BRIEF FOR APPELLEE E. J. ODERMATT.

MORLEY GRISWOLD AND GEORGE L. VARGAS,
JOHN S. HALLEY,
Reno, Nevada,
Attorneys for Appellee E. J. Odermatt.

Table of Authorities Cited

Cases

	Pages
McCue v. McCue, 123 Atl. 914 (Conn.)	5
Jacobs v. Southern Railway Company, 241 U. S. 229, 60 L.Ed. 970, 36 S. Ct. 588	6
Palmer v. Hygrade Company, 151 S. W. (2d) 548 (Mo. Ct. of Appeals), 551	11
Pittsburgh, etc. Ry. v. Arnott, 126 N. E. 13	10
Schmuck v. Beck, 234 Pac. 477 (Mont.)	6

Miscellaneous

38 American Jurisprudence, 699	7
38 American Jurisprudence, 1008	9
38 American Jurisprudence, 1079	7
Rules of Civil Procedure, Rule 51	4
Rules of Court of Appeals, Ninth Circuit, Rule 20	5

No. 12,668

United States Court of Appeals
For the Ninth Circuit

EDWARD HERZINGER,
Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT,
Appellees.

BRIEF FOR APPELLEE E. J. ODERMATT.

STATEMENT OF THE CASE.

We desire to call the attention of the Court to what is probably an unintentional misstatement of the testimony, which appears in Appellant's Statement of the Case at the bottom of page 5 of the brief. Appellant says that Nielson testified, on cross-examination, that he was in the barroom only a matter of seconds while the first storage tank was being filled. At no time did Nielson testify that he was in the barroom before the first underground tank had been completely filled. His testimony commences at page 400 of the record and he definitely said that he filled the first underground tank and then backed his truck into

a position so that he could fill the second or outside underground tank, and that after he had attached the hose from his truck to that second underground tank, he went into the barroom and spent only a few seconds while he purchased a soft drink and consumed a few swallows of it. He then went outside the barroom and completed filling the second underground tank. After that operation had been completed, he disconnected the hose from his truck, drained it by holding the truck end of it high overhead so that its contents would drain into the underground tank, and then he laid the hose on the ground. Immediately following that action, he returned to the barroom for the purpose of making an invoice for the gasoline which he had delivered. We do not find anything on page 440 of the record to the contrary. His whole story, both on direct and on cross-examination, was to the effect that he was not in the barroom more than twice; the first time was after he had started to fill the second tank, and the second time was after that tank had been completely filled.

We shall discuss the specification of errors in the order adopted by Appellant.

I.

The first Specification of Error goes to the refusal by the trial judge to charge the jury as requested by Plaintiff's Instruction No. 1, as follows: "If you find the defendant E. J. Odermatt is not an agent of the defendant Standard Oil Company of California, but

the defendant Standard Oil Company of California has represented to the plaintiff that E. J. Odermatt was its agent and thereby caused plaintiff justifiably to rely upon the care or skill of such apparent agent or his assistants, then the defendant Standard Oil Company of California is subject to liability to the plaintiff for harm caused by the lack of care or skill of the defendant E. J. Odermatt or his assistants the same as if the defendant E. J. Odermatt were the agent of the defendant Standard Oil Company of California."

The conclusive, although short, answer to that Specification of Error is that there was no evidence to support the requested instruction. In the whole record there is no evidence that Standard Oil Company of California represented to Herzinger that Odermatt was its agent so that Herzinger could rely upon the care or skill of Odermatt or the latter's assistants. Herzinger was on the witness stand a long time, and so was Moseley, his representative in charge of Mineral Hot Springs. Neither of them said anything about such a subject. Plaintiff called Odermatt as for cross-examination and the evidence he gave established that Odermatt was an independent contractor. Plaintiff is bound by that testimony because no contradictory evidence was introduced by him.

The jury could not be allowed to find that Standard Oil Company held out Odermatt as its agent to the extent stated in the requested instruction, when there was no evidence to that effect. The Court rightfully refused the instruction. Merely because a requested

instruction states a sound proposition of law is not a sufficient reason for giving it to a jury in a case where the principle of law there referred to cannot be applicable because of lack of evidence. Appellant fails to point out in his brief any evidence of that nature.

Moreover, the requested instruction was properly refused because it assumes lack of skill on the part of Odermatt and his assistant. The instruction does not contain a necessary phrase to the effect that "If you find lack of care or skill on the part of Odermatt or his assistant", and without that phrase the instruction seems to assume it, and the Court would have been in error in submitting the instruction as worded by Appellant.

II.

When the explanation or instruction supplemental to Instruction No. 22 was given to the jury, plaintiff made only a general objection to a portion thereof, as follows (R. p. 537):

> "Mr. Daly. I think, if the Court please, that the plaintiff will object to the giving of that portion of the explanation requested by the jury of instruction which states that the plaintiff's burden of proving negligence and the proximate cause of the fire is not changed by the rule just mentioned."

The Court will notice that no reason or ground was assigned for the objection. Rule 51 of the *Rules of Civil Procedure* provides in part as follows:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects *and the grounds of his objection.*" (Emphasis supplied.)

In Rule 20 of this Court it is stated:

> "When the error alleged is to the charge of the Court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial."

The trial judge could not possibly know, from the language of the objection, what might be plaintiff's ground therefor. Counsel did point out the portion to which he objected, but he merely said "Plaintiff will object." Counsel now says that the instruction was misleading, confusing and prejudicial to plaintiff. Those grounds were not stated before the jury retired again to further consider its verdict.

We think the rule precludes this Court from considering this Specification of Error.

Moreover, we respectfully submit that even if Appellant had timely stated the present ground, he would not have stated a sufficient ground.

In *McCue v. McCue,* 123 At. 914 (Conn.), the Court said:

> "The objection to the remainder of the excerpt contained in this assignment, that it is 'incoherent,

misleading and harmful' asserts no proposition of law."

In *Schmuck v. Beck,* 234 Pac. 477 (Mont.), the Court said:

"* * * the only objections urged to these two instructions, on settlement, are that they are not applicable to the issues and are against the law.

"* * * If an instruction is objectionable, it is the duty of counsel to point out the specific objection on the settlement of the instructions. The questions involved in the objections urged here were hardly presented by the meager objections stated on the settlement in the trial court; this court can only consider the objections made at that time."

In *Jacobs v. Southern Railway Company,* 241 U.S. 229, 60 L.Ed. 970, 36 S. Ct. 588, it was contended that an instruction "did not state the common law doctrine of assumption of risk" and the Court held that the ground was too vague and indeterminate to entitle Appellant to a construction of the point on appeal.

In this exception, Appellant is endeavoring to do a strange thing. Instructions Nos. 21 and 22 were given to the jury in the regular charge without any objection by Appellant. If the jury had reached the same verdict without asking additional instruction by the Court, there is not the slightest doubt that Appellant could not now say that anything in either of those two instructions was wrong. After considerable deliberation, the jury requested more instruction from the Court; the trial judge gave it in the so-called "Ex-

planation of Instruction No. 22". Appellant did object to part of the explanation and he believes, therefore, that such objection related back and applied to the original giving of Instruction No. 22. Appellant was too late; he should have objected when the instruction was first given.

However, if the explanation contained anything not originally included in Instruction No. 22, or that was contrary thereto, Appellant could object to the new matter. The specific portion of the explanation to which Appellant objected is as follows: "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned," and Appellant seems to particularly object to the words "the proximate cause of the fire".

The burden of proving negligence unquestionably was upon Appellant. The doctrine of *res ipsa loquitur* provides an inference which the Court stated Appellant could rely upon to supply evidence of negligence. Every plaintiff must show not only evidence of negligence, but that the negligence shown was the proximate cause of the injury.

> "Negligence, no matter in what it consists, cannot create a right of action unless it is the proximate cause of the injury of which complaint is made." 38 *Am. Jur.* 699.
>
> "It is well settled that in order for negligence to create liability it must be the proximate cause of the injury, and the court in a negligence action in submitting the case to the jury should so instruct the jury." 38 *Am. Jur.* 1079.

In the original Instruction No. 22, to which plaintiff did not originally object, the Court said (R. p. 42):

> "An inference arises that the proximate cause of the occurrence in question was some negligent conduct on the part of the defendant, E. J. Odermatt or his assistant."

Then the instruction stated:

> "That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant E. J. Odermatt, to rebut the inference by showing that he or his assistant did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure on his part or on the part of his assistant."

Certainly any later reference by the trial judge to negligence would mean such negligence as was the proximate cause of plaintiff's injury. Defendant could have been negligent, but the proximate cause of plaintiff's injury might have been some other agency or negligence. The reference to proximate cause in the subsequent explanation to the jury was merely a repetition of the reference as contained in the original Instruction No. 22.

Appellant confuses "burden of proof" with "burden of going forward with evidence", although he refers to both in his brief. The inference of negli-

gence raised by the doctrine of *res ipsa loquitur* supplies evidence for plaintiff, and thus shifts to defendant the burden of going forward with evidence. If defendant shows no evidence of having exercised due care, under the circumstances, the inference from the doctrine will support a verdict for plaintiff; but if defendant offers any contradictory evidence, it is the duty of the jury, as the trial judge so stated in this case, to weigh the inference against defendant's evidence. Still, the *burden of proof* is upon plaintiff to show negligence, i.e., negligence which was the proximate cause of plaintiff's injury. All this has been well said in 38 *Am. Jur.* at page 1008, as follows:

> "The doctrine does not have the effect of shifting the burden of proof, as distinguished from the burden of evidence, or, as it is sometimes phrased, the burden of proof in the sense of the risk of non-persuasion, as distinguished from the burden of going forward with the evidence; *all the defendant need do is produce exculpating evidence of equal weight.* While many cases would seem to indicate that the burden of proof does shift, nevertheless, upon close examination it is discovered that this is not the actual holding of these cases, but rather is a loose and unguarded use of the term, 'burden of proof.' But the doctrine of res ipsa loquitur does not cast on the defendant the burden of disproving negligence in the sense of making it incumbent upon him to establish freedom from negligence by a preponderance of the evidence. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. The doctrine does not dispense with the requirement that the party who

alleges negligence must prove the fact, but relates only to the mode of proving it. The rule merely takes the place of evidence as affecting the burden of proceeding with the case. The burden of proceeding means the burden of producing evidence, which shifts from party to party as the case progresses. Although the case is one authorizing the application of the doctrine, the plaintiff, nevertheless, must assume the burden of establishing negligence by a preponderance of the evidence. A mere equipoise in the evidence will not entitle the plaintiff to a verdict. If a satisfactory explanation is offered by the defendant, the plaintiff must rebut it by evidence of negligence or lose his case." (Emphasis supplied.)

The application of the *res ipsa loquitur* doctrine to the question of proximate cause has been considered by the Supreme Court of Indiana and decided adversely to the contention of Appellant here. In the case of *Pittsburgh, etc. Ry. v. Arnott,* 126 N.E. 13, the opinion of the Court stated:

"The fourth instruction given by the court was particularly harmful to appellant when considered in the light of the evidence. The instruction is as follows:

'When it is shown that a passenger on a railroad train was injured while being carried, the presumption arises that the injury was caused by the negligence of the carrier, and the burden rests upon the carrier to remove and overcome this presumption.'

* * * * * * *

It is one thing for a jury to find that the accident or condition of which the plaintiff complains was

due to the negligence of the defendant, and quite another thing to find that such accident or condition produced the injury of which the plaintiff complains. The first is a finding of negligence, and the second is a finding on the question of proximate cause. The rule of res ipsa loquitur applies to the question of negligence, but it has no application to the question of proximate cause. The error in the instruction under consideration is that it applies the rule to both."

In *Palmer v. Hygrade Co.*, 151 S.W. (2d) 548 (Mo. Ct. of Appeals), at page 551, we read:

"Even under the res ipsa rule it is not sufficient that plaintiff merely show an accident and a resulting injury, but plaintiff must go further with the proof and show that the accident was the result of defendant's negligence. And though plaintiff may do this by circumstantial evidence, that is, by showing that the accident occurred under such unusual circumstances that a reasonable mind would infer therefrom negligence on defendant's part; nevertheless, the burden of proof remains with plaintiff throughout the case."

III.

The third Specification of Error goes to the question of negligence and it suggests that due care was not exercised in the delivery of the gasoline. The gravamen of Appellant's argument on that point seems to be that Nielson violated accepted safety rules and that the Court or jury is bound, therefore,

to decide for Appellant. A careful examination of the rules and the evidence on behalf of defendants discloses that any such violation could not possibly have been the proximate cause of the accident.

The rules, as recognized and approved by defendant's expert witness, Ryan, are as follows (R. p. 520):

> "When deliveries are being made through tank truck hose, employee must stand at the tank truck faucet or nose nozzle valve until the delivery has been completed."
>
> "During filling operations, either into underground storage tanks or at other containers, it is the employee's responsibility to determine that there are no sources of ignition present."

There were two underground tanks at Mineral Hot Springs. Nielson testified (R. p. 409, et seq.), that he filled the inner one, then backed his truck and put it in position beside the outer tank (R. p. 414); then he turned off the motor, took the hose off the truck, inserted the nozzle into the filler pipe of the underground tank, and then attached the other end of the hose onto the outlet valve on his delivery truck. He had been told that the outside tank was empty, but he used a measuring stick to satisfy himself that the statement was correct. That outside tank held 520 gallons of gasoline. The delivery truck contained several compartments, one of which held 300 gallons of gasoline and Nielson then drained it into the underground tank, consuming 10 or 15 minutes. After he made the connection and started the draining of that 300-gallon tank, he left his truck and went into Herzinger's bar

and purchased a soft drink (R. p. 441 and p. 420), and had a "swallow or two". He could see his truck. When he went back to his truck, he discovered that the underground tank had not yet been filled to capacity, so he connected the tank end of the hose to another compartment of his truck, containing 200 gallons, and drained it into the undeground tank, consuming an additional period of 8 to 10 minutes. (R. p. 416.) Then he turned off the faucet and disconnected the hose from that valve. He lifted high that end of the hose to drain it into the underground tank, laid the hose down alongside the cement island, and went inside the bar to make an invoice for the gasoline he had just delivered. (R. p. 416.) (See also Klitz, R. p. 212.) He did not immediately attend to the invoice, but drank more of the soft drink, and then he went to a panorama or moving picture machine, wherein he inserted a coin to make it operate and then he returned to the bar, from where he could see the picture while consuming the remainder of his drink. Then the picture began to flicker (R. p. 420), and a patron at the bar (Klitz) asked the barkeeper if the latter could fix it. The barkeeper replied in the negative and Klitz went to the machine in an effort to fix it. Klitz, a witness for plaintiff (R. p. 212) testified that Nielson had been in the bar on that second occasion "approximately ten minutes, maybe fifteen, something like that", before the picture machine "started to act up". Then Nielson heard someone yell "Hey", and he turned and saw a flash of fire outside the bar.

There can be no denial of the fact that Nielson disobeyed the rule when he left his truck just after he started to fill the second underground tank. But he was gone only a very short time; he said "only a few seconds". He returned to the truck before the 300-gallon compartment had been drained. He remained beside his truck to change the hose to the 200-gallon compartment. Add to those 10 minutes the period of at least 10 minutes which Klitz said Nielson spent in the barroom immediately thereafter, and we have *at least* 20 minutes elapsing from the end of the infraction of the rule to the flash of fire. Nielson said (R. pp. 415, 416) that there was no spilling of gasoline on the ground, and that each time he connected or disconnected the hose to his truck he had to use a wrench.

There is not the slightest room for a thought that Nielson's absence from his truck was in any way connected with the fire. When the flash of fire came, Nielson had completely finished and had disconnected the hose from his truck and laid it on the ground. The rule applies only during the delivery or flow of gasoline. Certainly Nielson was not negligent or in violation of any rule when he left the truck to make his invoice after filling the tank, nor did the rule prohibit him from enjoying a soft drink and a picture while attending to the invoice. Appellant's reference to the rule is merely an effort to becloud the issue.

As to the other rule, all the evidence on Appellant's side was to the effect that there was nothing in use or operation about the premises which would have caused

the ignition of the gas vapor. We must bear in mind that all the premises, except the gasoline pumps, were under the control of Herzinger and not any defendant. If Appellant had shown the existence of an agency which could have caused ignition of the vapor, Nielson would have violated the rule if he did not look for it, and he would have been negligent if he did not find what he ought to have seen. But Appellant's own evidence established the fact that there was nothing; consequently if Nielson failed to look, no harm resulted. Moreover, the rule says "During filling operations", and the uncontradicted evidence is that both underground tanks had been filled and the hose disconnected from the tank truck and laid on the ground at least ten minutes before the fire occurred. The rule does not say that making an invoice is part of "filling operations".

On page 27 of the brief, Appellant says:

> "we submit that it is most logical to believe that if the nozzle of the hose was still in the filler pipe to the underground tank, that gasoline was being delivered through the hose at the time the fire began."

Nobody testified that the truck end of the hose was attached to the truck at the time the fire flashed, and Nielson positively said it was detached and on the ground. We are unable to understand how gasoline could continue to flow from the tank truck through that hose unless the hose was attached to the truck. Anyway, it was for the jury alone to determine the facts.

The only evidence the defendants could present to rebut the inference under the *res ipsa loquitur* doctrine (assuming that the doctrine is applicable) was for Nielson to tell what he did. He told it, and we respectfully submit that his story shows he did what was customarily and usually done, and that he exercised due care under the circumstances. (See testimony of witness Harmer, R. pp. 461, 462.)

IV.

Appellant's Specification of Error No. IV must not be permitted to mislead. A careful reading of it, as it is stated on pages 9 and 10 of the brief, reveals that the first part of the quotation from the record must be ignored, because Appellant's objection was fully sustained. The specification should not receive consideration beyond the scope suggested by Appellant himself when referring to it in his Statement of the Case (see bottom of page 6 of brief) and again in his printed argument (page 40 of brief). The latter reference is as follows:

> "The witness was permitted to say in substance that he could see no possibility of a fire emanating in or about the truck without some outside agency, light or fire. * * *"

Appellant does not there refer to what he says is the objectionable portion of that Specification of Error wherein the words "from your hearing and observation of the testimony already offered in this case" were used in the previous question.

The alleged error by the Court below was in permitting witness Ryan to be asked and to answer as follows on redirect examination (R. p. 522):

> "Q. As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?
>
> Mr. Parry. Objected to as not stating facts upon which it is based. It must be a hypothetical question and it does not state any facts at all.
>
> The Court. Objection will be overruled.
>
> A. I can see no such possibility."

Immediately prior to that question was one wherein Ryan was asked: "From your hearing and observation of the testimony already offered in this case, is it your opinion that there was any outside agency at the time of the fire at or near the truck which caused the fire?" Appellant's objection to that question was sustained. Then the witness was asked the question first quoted above, which is the subject of this Specification of Error. It will be noticed that the second is a very different question than the previous one which had been ruled out. The second one has no reference to any of the testimony already offered in the case. When the Court ruled out the previous question containing such reference, the whole question was eliminated, and the last question stood as stated and could not have carried with it any part of the previous question which had been ruled out by the Court. Appellant incorrectly attempts to attach the phrase "from your hearing and observation of the testimony already offered in this case" to the second question.

We respectfully submit that it is an improper distortion.

The question and answer to which Appellant objects were merely a repetition of what had been developed during the prior examination of Ryan without objection by Appellant. On page 500 of the Record, there appears Ryan's statement of the three elements of fire. There he was asked:

> "* * * how, from a scientific viewpoint, would it be possible to ignite gasoline or gasoline vapors? In other words, would it require some outside agency?"

He answered: "Definitely."

Then the Record shows this, at page 501:

> "Q. In other words, as I understand it, in order to ignite gasoline or gasoline vapors, it would be necessary that an outside agency of fire come in contact with the vapor or the gasoline?
>
> A. Well, heat in some form; we will say a flame or a spark or a hot surface.
>
> Q. A hot surface?
>
> A. That's right.
>
> Q. But outside of those three outside agencies, gasoline or the vapors would not ignite?
>
> A. That is correct."

On page 503 of the Record, there appears a long hypothetical question which contains a statement of evidence previously received concerning the physical conditions existing at the time of the fire. Indeed, counsel for Appellant interrogated Ryan about the three elements of fire (combustible material, air, and

a source of ignition) and asked this question (page 518):

> "Q. We had combustible material and oxygen there, so the question comes to the point of ignition. Now then a fire would have to start at the point of ignition?
>
> A. That is right."

We think the question now argued involved nothing more than a further inquiry concerning the point of ignition. We repeat,—the question was not based upon any hearing or observation of the witness of other testimony, nor was his answer. All facts in the case necessary to answer that question had been given to Ryan during his previous examination.

It is respectfully submitted that there was no error on the part of the court below and that the judgment in this case should be affirmed.

Dated, Reno, Nevada,
March 5, 1951.

Respectfully submitted,
MORLEY GRISWOLD AND GEORGE L. VARGAS,
JOHN S. HALLEY,
Attorneys for Appellee
E. J. Odermatt.

No. 12668

IN THE

United States

Court of Appeals

For the Ninth Circuit

EDWARD HERZINGER, Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT, Appellees.

Reply Brief of Appellant

Upon Appeal From the District Court of the United States For the District of Nevada

HON. ROGER T. FOLEY, District Judge

ORVILLE R. WILSON,
Residing at Elko, Nevada,
R. P. PARRY
J. R. KEENAN
T. M. ROBERTSON
JOHN H. DALY
Residing at Twin Falls, Idaho,
Attorneys for Appellant.
SAMUEL PLATT
Residing at Reno, Nevada,
WALLACE L. KAAPCKE
ALEXANDER R. IMLAY
MARSHALL P. MADISON
FRANCIS R. KIRKHAM
Residing at San Francisco 4, California
Attorneys for Appellee Standard Oil Company of California

Filed ....., 1951

....., Clerk

INDEX

PAGE

Summary of Argument 1

Arugment 2

I. Appellant is entitled to assign as error the refusal of the Court to give plaintiff's requested Instruction No. 1 (Refused) and the inclusion by the Court in its "Explanation Requested by Jury of Instruction No. 22" of the portion objected to by appellant 2

II. The Court erred in refusing to give the Jury plaintiff's Instruction No. 1 (Refused) 6

III. This is a proper case for the application of the doctrine of res ipsa loquitur 9

IV. The portion of the "Explanation Requested by Jury of Instruction No. 22" objected to by appellant was, particularly under the circumstances, improper and confusing to the Jury 12

V. Nielson's testimony shows, as a matter of law, that he was negligent 14

VI. The expert witness Ryan's opinion was elicited either based upon his hearing and observation of the testimony already offered in the case, or based upon no facts whatsoever 17

Conclusion 27

CITATIONS

CASES PAGE

Alcaro v. *Jean Jordeau, Inc.*,
(3 Cir. 1943) 138 F.2d 767, 771 4

Evansville Container Corp. v. *McDonald*,
(6 Cir. 1942) 132 F.2d 80, 84 4

Gordon v. *Aztex Brewing Co.*, (1949),
90 Cal.2nd 514, 203 P.2d 522 12

Jesionwski v. *Boston & M. Ry.*, (1947),
329 U.S. 452, 91 L.Ed. 355, 67 S.Ct. 401, 169
A.L.R. 947 10

Lynch v. *Meyersdale Electric Light, H. & P. Co.*,
(1920), 268 Pa. 337, 112 Atl. 58 12

Las Vegas Hospital Ass'n, Inc. et al v. *Gaffney*,
(1947), 64 Nev. 225, 180 P.2d 594 12

Montgomery Ward & Co. v. *Stevens*, (1941),
60 Nev. 358, 109 P.2d 895 6

Palmer v. *Hoffman*, (1943), 318 U. S. 109,
63 S. Ct. 477, 483 3

Stilwell v. *Hertz Drivurself Stations*,
(3 Cir. 1949) 174 F.2d 714.....4

Sweeney v. *Erving*, 228 U. S. 223,240,
57 L.Ed. 815, 33 S.Ct. 416 11

Sweeney v. *United Features Syn.*, (2 Cir. 1942)
129 F.2d 904 .....4, 5

Weaver v. *Shell Co.*, (1936), 13 Cal.App.2d 643,
57 P.2d 571 11

MISCELLANEOUS:

A.L.R., Vol. 169, p. 947, 951 10

Barron & Holtzoff-Federal Practice and
Procedure, Vol. 2, p. 801 5

IN THE

United States
Court of Appeals
For the Ninth Circuit

EDWARD HERZINGER, Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT, Appellees.

Reply Brief of Appellant

REPLY BRIEF OF APPELLANT

In view of the fact that the brief of Standard Oil Company of California has raised the question of the applicability of the doctrine of res ipsa loquitur to this case, and also in view of the fact that appellant's position in several phases of this appeal has been misinterpreted by Standard Oil Company of California, appellant deems it advisable to submit this reply brief. The several matters will be discussed in substantially the order presented by the brief of Standard Oil Company of California.

SUMMARY OF ARGUMENT

I.

Appellant is entitled to assign as error the refusal of the Court to give plaintiff's requested Instruction No. 1 (Refused) and the inclusion by the Court in its "Explanation Requested by Jury of Instruction No. 22" of the portion objected to by appellant.

II.

The Court erred in refusing to give to the Jury plaintiff's Instruction No. 1 (Refused).

III.

This is a proper case for the application of the doctrine of res ipsa loquitur.

IV.

The portion of the "Explanation Requested by Jury of Instruction No. 22" objected to by appellant was, particularly under the circumstances, improper and confusing to the Jury.

V.

Nielson's testimony shows, as a matter of law, that he was negligent.

VI.

The expert witness Ryan's opinion was elicited either based upon his hearing and observation of the testimony already offered in the case, or based upon no facts whatsoever.

ARGUMENT

I.

Appellant is entitled to assign as error the refusal of the Court to give plaintiff's requested instruction No. 1 (Refused) and the inclusion by the court in its "Explanation Requested by Jury of Instruction No. 22" of the portion objected to by appellant.

Standard Oil Company of California contends

that since appellant failed to state specific grounds for his objections to the Court's refusal to give Plaintiff's Requested Instruction No. 1 (Refused) and to a portion of the "Explanation Requested by Jury of Instruction No. 22," that appellant is barred from assigning these as error on appeal.

Appellant admits that the record reveals only a general objection to the Court's refusal to instruct as appellant requested. What the record does not show is the extended and exhaustive oral discussion between the Court and all counsel with respect to all instructions given or refused by the Court. In the light of this fact the case cited by Standard Oil Company of California should be reviewed.

Palmer v. *Hoffman*, (1943) 318 U. S. 109, 63 S. Ct. 477, 483, states:

> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error."

With this rule we have no objection for in the present case both Court and counsel were fully informed as to the specific reasons for appellant requesting the questioned instruction, and the grounds for objecting when the Court refused it.

As the Court of Appeals for the Third Circuit has said on two occasions:

> "Rule 51 is designed to preclude counsel from assigning for error on appeal matter at trial

> which he did not fairly and timely call to the attention of the trial court." (*Stilwell* v. *Hertz Drivurself Stations*, (3 Cir. 1949) 174 F.2d 714, 715; *Alcaro v. Jean Jordeau, Inc.*, (3 *Cir.* 1943) 138 *F.2d* 767, 771.)

This same interpretation of the rule was given by the Sixth Circuit when it spoke of the purpose of the rule being: "to call the trial court's attention specifically to the parties' requests or objections." *Evansville Container Corp.* v. *McDonald*, (6 Cir. 1942) 132 F.2d 80, 84.

Standard Oil Company of California does not contend that it or the Court were unaware of the grounds for appellant's objections; it merely argues that the grounds are not in the record. Under very similar circumstances the Second Circuit has said:

> "The purpose of exceptions is to inform the trial judge of possible error so that he may have an opportunity to reconsider his rulings and, if necessary, correct them. See Rule 46, F.R.C.P.; 3 Moore's Federal Practice, p. 3090. Here it appears that there was full discussion of the point raised which adequately informed the court as to what the plaintiff contended was the law, and the entry of a formal exception after that would have been a mere technicality. Cf. *Stolz v. United States*, 9th Cir., 99 F.2d 283, 284. Those cases construing Rule No. 51, F.R. C.P. strictly all involve situations where no in-

> dication was given to the judge that error would be assigned to his ruling." *Sweeney v. United Feature Syn.* (2 Cir. 1942) 129 F.2d 904 and 905.

Appellant has satisfied the reason and meaning for the rule, and the assignments of error in this case are in keeping with the spirit of the rule as interpreted by the courts as cited above. His position is justified in the language of a general authority which summarizes the situation by saying:

> "But Rule 51 is not top-heavy with technical excuses for overlooking trial errors. After all only those errors are waived which might have been corrected had the proper objection or request been made. If the trial judge is fully informed of the specific grounds of objection or request, there is no need for repetition." 2 *Barron & Holtzoff—Federal Practice and Procedure p.* 801

In the instant case the Court, upon adjournment for the evening recess on Wednesday, February 15 at about 4:30 p. m., called counsel into chambers for the purpose of discussing the instructions. All counsel were present and the discussion continued until after 9:30 p. m. without interruption even for the purpose of eating. Each party submitted requested instructions and every proposed or requested instruction was discussed by the Court and counsel at great length and in detail.

Also, Plaintiff's Requested Instruction No. 1 (Refused), as submitted, cited as authority the case of

Montgomery Ward & Co. v. *Stevens,* (1941) 60 Nev. 358, 109 P.2d 895. This case and the principle of law contained in the requested instruction was presented to the Court during the lengthy argument on the motion to dismiss made by Standard Oil Company of California at the close of Plaintiff's case, the motion being upon the ground that the defendant Odermatt was not an agent of Standard Oil Company of California. This authority pointed up the specific position of appellant in requesting Plaintiff's Requested Instruction No. 1 (Refused).

In substance, the same is true of the general objection made to the inclusion in the "Explanation Requested by Jury of Instruction No. 22" of the portion objected to by appellant. When the Court received the note from the foreman of the jury, after the jury had deliberated some ten hours, the Court called counsel for each of the parties to chambers and a full and complete discussion was had concerning all parts of the explanation to be given by the Court. Both Court and counsel were fully informed of the basis for the objection.

The Court was not misled by the fact that appellant made only general objections and it is a perversion of fact to indicate that it was.

II.

The court erred in refusing to give to the jury plaintiff's Instruction No. 1 (Refused).

Standard Oil Company of California, beginning at page 6 of its brief, contends that the requested in-

struction was properly refused because the evidence does not show either representations by Standard Oil Company or reliance thereon by appellant.

The relationship between the parties arose when appellant purchased the Mineral Hot Springs property and as a part of the purchase took an assignment of a dealer agreement between Standard Oil Company of California and one O. J. McVey (R. Vol. I, pp. 259, 262, Plaintiff's Exhibit 10). Under this agreement the petroleum products to be handled by appellant at Mineral Hot Springs were to be only those of Standard Oil Company of California. The details of delivery of the petroleum products to Mineral Hot Springs are not contained in the agreement. The defendant Odermatt in one capacity or another had been delivering petroleum products in the area of Mineral Hot Springs from the bulk plant at Wells, Nevada, since about 1932 (R. Vol. I, p. 78). It is certainly safe to assume that appellant was aware of the source of supply of the petroleum products to be handled by him at Mineral Hot Springs. Standard Oil Company of California saw fit to transact all of its business with appellant through the defendant Odermatt. Plaintiff's Exhibits 1, 2, 3 and 4, when described as being typical of the method of transacting business disclose, that not only were the petroleum products of Standard Oil Company of California delivered to Mineral Hot Springs by Odermatt, but also Odermatt gave appellant credit for petroleum products sold on Standard Oil Company of California credit cards, received

payment for petroleum products of the Company (R. Vol. I, p. 56), and received rentals under a lease of the premises between appellant and the Company (R. Vol. I, p. 61).

It is difficult to visualize a situation in which a Company in the position of Standard Oil Company of California could do more to represent to one of its dealer accounts that a certain individual was the agent of the Company. The only logical impression which appellant could receive from the fact that all of his dealing with Standard Oil Company of California were handled by Odermatt and on forms furnished by and showing the name of the Company (Pl. Exhibits 1, 2 and 4), was that Odermatt was the agent of Standard Oil Company of California.

As for reliance upon the representations, what more reliance could there be than the continued performance by appellant under the dealer agreement and the continued permitting of Odermatt or an assistant to deliver highly volatile petroleum products upon the premises of appellant? On these premises there were located valuable improvements which, as was amply demonstrated, could be readily destroyed by fire resulting from improper handling of such petroleum products.

We are not impressed by the contention of Standard Oil Company of California that the record affirmatively shows knowledge by appellant that Odermatt was not the servant or agent of Standard Oil Company of California. The basis for this con-

tention is apparently that appellant was to learn something regarding the status of Odermatt from an examination of appellant's dealer agreement with Standard Oil Company of California. Such a result does not follow. Also, it would not seem significant that the name of Standard Oil Company of California did not appear on the truck or that the door of the truck was painted with the words "E. J. Odermatt, Wholesale Distributor, Wells, Nev."

III.

This is a proper case for the application of the doctrine of res ipsa loquitur.

Standard Oil Company of California contends that appellant's objection to the inclusion by the Court in its "Explanation Requested by Jury of Instruction No. 22" of the portion objected to by appellant is without merit, first because appellant received the benefit of the doctrine of res ipsa loquitur to which he was not entitled.

The application of the doctrine of res ipsa loquitur was argued fully to the Court upon the motion to dismiss made at the close of the plaintiff's case and the Court concluded properly that this was a proper case for the application of the doctrine.

The cases cited by Standard Oil Company of California contain language to the effect that the doctrine of res ipsa loquitur cannot be applied where all the possible causes of the accident are not under the control of the defendant. Similar language is

contained in many cases discussing the doctrine. However a review of the authorities will disclose that the doctrine of res ipsa loquitur has not been limited or fixed to such an extent.

Recently the Court of Appeals for the First Circuit reversed a case on the ground that it was improper for a jury to draw an inference of defendant's negligence from an accident which included activities of the injured person, even though the jury, under proper instructions, could find from the evidence that the injured person's activities did not cause the injury. The United States Supreme Court thought this point was of sufficient importance to grant certiorari, to amend this rule, and to reverse the Court of Appeals. *Jesionowski* v. *Boston & M. Ry.*, (1947) 329 U. S. 452, 91 L. Ed. 355, 67 S. Ct. 401, 169 A.L.R. 947. Justice Black delivered the opinion and attacked the erroneous concept of res ipsa loquitur which holds that the rule has rigidly defined prerequisites, one of which is that to apply it, the defendant must have exclusive control of all the things used in the operation which might probably have caused the injury. He said:

> "Res ipsa loquitur, thus applied, would bar juries from drawing an inference of negligence on account of unusual accidents in all operations where the injured person had himself participated in the operations, even though it was proved that his operations of the things under his control did not cause the accident." 169 A.L.R. 947, 951.

He cites *Sweeney* v. *Erving*, 228 U. S. 223, 240, 57 L. Ed. 815, 33 S. Ct. 416, as sound authority for his view that it is not a question whether the application of the rule fits squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify an inference of defendant's negligence. Thus, in the two cases in which the U. S. Supreme Court considered this very issue, it has strongly stated its preference for a realistic and liberalized view of the rule. For, as Justice Black said, it would "run counter to common everyday experience" to say that, after a finding by the jury that none of the possible causes of the accident under the control of the injured person did in fact cause the accident, that the jury is without authority to infer that defendant was negligent with respect to possible causes of the accident under his exclusive control.

It is apparent that appellees could not have been injured or prejudiced by the application of the doctrine under these circumstances because the jury had been instructed to consider the possible negligence of the appellant before it turned to an inference of negligence on the part of the appellee.

Standard Oil Company of California cites several cases supporting the restrictive interpretation of the doctrine of res ipsa loquitur. All of these cases can be distinguished on their facts, and at least one, *Weaver* v. *Shell Co.*, (1936) 13 Cal.App.2d 643, 57 P.2d 571, turns partially on the less favorably regarded premise that the doctrine can be ap-

plied only when the facts of the accident are more accessible to defendant than to plaintiff. But regardless of these distinctions, appellant admits that within the large body of cases discussing the doctrine, there are those which adhere to the stringent and narrow rule so severely criticised by the Supreme Court. The doctrine, through its manifold use by the courts, has tended to become formalized and unrealistic and not responsive to the need for which it was created. The better reasoning is contained in the language of the Supreme Court quoted above and in many decisions which have recognized the proper application of the doctrine with a view toward its purpose rather than the ability to fit the facts into narrowly defined stringent rules and definitions. *Lynch* v. *Meyersdale Electric Light, H. & P. Co.*, (1920) 268 Pa. 337, 112 A. 58; *Gordon* v. *Aztex Brewing Co.*, (1949) 90 Cal. 2d 514 203 P. 2d 522; *Las Vegas Hospital Ass'n, Inc., et al.* v *Gaffney*, (1947) 64 Nev. 225, 180 P.2d 594.

IV.

The portion of the "Explanation Requested by Jury of Instruction No. 22" objected to by appellant, was, particularly under the circumstances, improper and confusing to the jury.

Standard Oil Company of California next takes the position that the portion of the Court's Explanation Requested by Jury of Instruction No. 22 to which appellant objected was proper and therefore appellant's objection is invalid.

The circumtances under which the Court's Explanation was given to the jury should certainly be considered in determining whether or not the explanation and particlarly the portion thereof objected to by appellant was proper.

The jury obviously had found that none of the instrumentalities under plaintiff's control were the cause of the fire, otherwise it would not have been concerned, as its note shows it was (R. Vol. I, p. 23), with the existence of the inference and the question of which party had the duty to explain the cause of the fire. Under those circumstances and knowing the particular question in the minds of the jurors, the Court, in effect, gave instruction No. 22 to the Jury again but inserted in it the words "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned." The inclusion of these words had the effect of again giving instruction No. 21. At this point, in view of the obvious determination by the jury that none of the instrumentalities under the control of the plaintiff had caused the fire, there could not help but be confusion in the minds of the jurors.

The case is different from the majority, in that the Court did not give all of its instructions to the jury at one time, but gave its "Explanation Requested by Jury of Instruction No. 22" after the jury had deliberated some ten hours and after receiving a note from the foreman which made the

particular concern of the jury known to the Court. It is appellant's position that under these circumstances the inclusion of the words objected to by appellant in the Court's explanation nullified the doctrine of res ipsa loquitur, to the benefits of which appellant was entitled.

That the jury was confused by Instructions No. 21 and 22 is apparent, the Court's explanation given to the jury in the early hours of the morning merely added to this confusioon.

V.

Nielson's testimony shows, as a matter of law, that he was negligent.

Appellant cannot agree with Standard Oil Company of California's conclusion that the testimony of Nielson, the driver of the truck, shows that he did exercise reasonable care under the circumstances while delivering the gasoline, and this is true even though his testimony be entirely accepted as true.

Several items of negligence on the part of Nielson are set forth on pages 26 and 27 of appellant's brief. If there were no other factors of negligence involved, the fact that Nielson laid the hose on the ground with the nozzle of the hose in the filler pipe while he went inside the building would certainly be sufficient to show that his actions were not those of a person exercising reasonable care.

It is certainly seriously contended that Nielson

had a duty to determine that there were no sources of ignition present during the delivery of gasoline. That this was an accepted safety rule was shown by the testimony of Standard Oil Company of California's own expert witness Ryan (R. Vol. II, p. 520). Standard Oil Company of California is bound by the testimony of this witness and cannot now be heard in its attempt to impeach its own witness.

Likewise, appellant cannot agree that a logical cause of the fire was shown as set forth on page 24 of Standard Oil Company of California's brief. This is particularly true in view of the emphasis placed upon the kerosene refrigerator. The only affirmative evidence in the record relating to the question of whether or not this kerosene refrigerator was in operation at the time of the fire is the testimony of Mr. Mosely (R. Vol. 1, p. 113) and of the completely disinterested Mrs. McLean (R. Vol. 1, p. 248). Both of these witnesses testified positively that it was not in operation and had not been for several months. Defendants produced no witnesses to rebut this testimony. An attempt is made to infer that this kerosene refrigerator was in operation at the time of the fire from the fact that after this prolonged and intense fire remains of cooked meats were found in the refrigerator. Mr. Mosely (R. Vol. I, p. 160) explained that the remains were of *cured* meats which had been stored in the non-operating refrigerator. This explanation is not denied or rebutted.

Standard Oil Company of California (Br. 24) states that whether this refrigerator was in opera-

tion at the time of the fire or whether it was not is a matter of conflicting evidence. There is no conflict in the evidence—the uncontradicted evidence is that the kerosene refrigerator was not operating. There is no evidence upon which the jury could have found that it was.

As to other appliances causing the fire, all of these appliances were located within the building. The witness Ryan testified (R. Vol. II, p. 518) that any such fire would have to start at the point of ignition and would thereafter tend to follow the vapor trail back to the source of the vapor. That the fire did not start within the building is agreed upon by all of the witnesses present. The witness Mosely testified (R. Vol. I, p. 103) that he saw the fire "right under the truck." The witness Klitz testified (R. Vol. 1, p. 199) that the fire when he looked up was in front of the building, that there was no fire in the panorama machine and no fire in the grocery store. The witness Nielson testified (R. Vol. II, p. 421) "I turned around and noticed the flash of fire next to the window *outside.*"

The evidence produced by the defendants does not explain the fire and does show that the acts of Nielson were not those of a person exercising ordinary care. Under the authority of the cases cited in appellant's brief, (pp. 28 through 30), it should be held that the defendants failed to sustain the burden of showing that due care was exercised.

VI.

The expert witness Ryan's opinion was elicited either based upon his hearing and observation of the testimony already offered in the case, or based upon no facts whatsoever.

Beginning at the bottom of page 25 of the brief of Standard Oil Company of California, the propriety of the Court's ruling challenged by point IV of appellant's Specification of Errors is discussed. Nowhere in this discussion is there any dispute with the authorities cited by appellant in support of this point (appellant's Br. pp. 34-39). Instead, Standard Oil Company of California offers several contentions which it claims warranted the trial court in permitting the witness Ryan to testify as shown on pages 522 and 523 of Volume II of the Record.

The first contention is that the assumption made by appellant that the witness was asked his opinion based upon "hearing and observation of the testimony already offered in the case" is incorrect, and that the objectionable question was merely one of a series of at least six questions asked of the witness relating to possible causes of fire.

It is believed that a complete analysis of the testimony of the witness Ryan will reveal the error in this contention of Standard Oil Company of California.

In the first place, the testimony contained in Point IV of appellant's Specification of Errors is improperly analyzed by Standard Oil Company of

California. The witness Ryan (R. Vol. II, pp. 522, 523) was first asked:

> "Mr. Ryan, the cross-examination has suggested another question on redirect examination. From your hearing and observation of the testimony already offered in this case, is it your opinion that there was any outside agency at the time of the fire at or near the truck which caused the fire?"

This was objected to as

> "not a proper hypothetical question by reference and not proper redirect * * *"

The Court then overruled the objection and directed the witness to answer the question. The witness then began his answer,

> "I saw no evidence indicating there was a source of ignition which the operator of the truck—"

This answer was objected to as

> "invading the province of the jury."

The Court then stated,

> "It is not responsive. Read the question."

After the question was read, the objection to the *answer* was renewed. The Court then sustained the objection. Properly analyzed the situation at this point was in substance that the Court had overruled an objection to the question based upon the witness'

hearing and observation of the testimony but had sustained an objection to the answer commenced by the witness, the Court apparently being of the opinion that the answer was not responsive to the question. At best, it is obvious that the exact situation at this point in the testimony was somewhat confusing, particularly would this be true insofar as the jury was concerned.

The witness was then asked,

> "As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?"

This was objected to, the objection overruled, (the Court being consistent with its ruling on the previous *question*) and the witness permitted to answer,

> "I can see no such possibility."

Obviously the witness was asked for an opinion based upon something. The important consideration is what did the jury understand to be the basis of the called for opinion. The only possible impression which the jury or anyone reading the record could receive is that the witness was being asked for his opinion based upon his "hearing and observation of the testimony already offered." This naturally follows since it was the basis outlined in the question immediately preceding and no other basis for the opinion is stated in the objectionable question.

If the witness' opinion was not called for upon his hearing and observation of the testimony already

offered, *then his opinion was elicited upon the basis of no facts whatsoever.* If the latter is the situation, then the objection to the question should certainly have been sustained in view of the unquestioned general rule relating to the fundamentals of proper examination of expert witnesses, which rule and the reasons therefor are set forth on page 34 and 35 of appellant's brief.

Even if it be assumed that the Court did sustain an objection to the first question quoted above, it certainly cannot be successfully argued that the question the witness was permitted to answer was but one of a series of questions. The witness was called to testify during the afternoon session on Wednesday, February 15, direct examination of the witness was completed and his cross-examination had begun when the evening recess was taken. On the morn- of Thursday, February 16, the cross-examination was completed, and it was on re-direct examination that the objectionable question was asked. All of the other questions which Standard Oil Company of California suggests as composing the so-called series of questions were asked on the previous day and prior to cross-examination. There is absolutely nothing in the question or remarks of counsel to in any way justify the suggestions that the objectionable question was one of a series or that the objectionable question was based upon the hypothetical facts assumed in questions asked the previous day.

The first two questions included within Standard Oil Company of California's "series of at least six

questions," namely, those relating to spontaneous combustion and an open flame, were general questions not relating to or directed to the fire involved in this action. The hypothetical questions related to the particular circumstances involved in the action. It should be noted that in asking these hypothetical questions, counsel was very careful to inform the witness, the Court and the jury that the questions were hypothetical questions and were being asked upon assumed facts. "*I want to ask you now, Mr. Ryan, a so-called hypothetical question based, I hope, upon the evidence introduced in this case. Let us assume* * * *" (R. Vol. II, p. 503). "*Let me amplify that question by this statement: There has been some variation in the evidence with respect to heat, but assuming, Mr. Ryan, that the heat on that day was* * * *" (R. Vol. II, p. 505). "*Let me ask you this further hypothetical question. Assuming in this case that the truck in question* * * *" (p. 507). "*Let me ask you this brief hypothetical question. Assume that the canopy we have just referred to* * * *" (p. 509). "*Well, here is another hypothetical question,* * * * *Assume there is a hot water heater* * * *" (p. 511). "*Well, assuming, as I understand Mr. Herzinger to testify,* * * *" (p. 511). "*Well, assuming that at the time of this fire it was a still day* * * *" (p. 512).

It seems quite clear from the quotations above that counsel, when asking a question based upon hypothetical or assumed facts, was extremely careful to frame his questions so as to make the premise clear,

and it is likewise apparent that the objectionable question was not asked upon any hypothetical set of facts but upon the witness' "hearing and observations of the testimony already offered."

It is certainly not proper to assume that the question was cumulative and by way of summary of previous questions or that it was merely repetition. The question was asked with a purpose and that purpose was to elicit from the witness his answer to the fundamental issue in the case based upon not assumed facts made know to the Court and the jury, but upon the witness' hearing and observation of the testimony.

Standard Oil Company of California attempts to justify the Court's ruling upon the grounds that the witness had previously testified in substantially the same manner (Br. 28). This contention is likewise without merit when it is remembered that the testimony of the witness quoted on page 28 of Standard Oil Company of California's brief related not to the particular fire involved but to fires generally. The objectionable question and answer did not relate to gasoline vapor fires generally, but to the particular fire involved in this action and to the particular truck involved in this action. From the standpoint of prejudice to appellant, the difference between the two is at once apparent. In the one case, the witness was permitted without objection to testify that it was necessary for there to be some agency outside of the gasoline and the gasoline vapors which

would be necessary to cause a fire. *The objectionable question elicited an answer which in essence eliminated the truck and anything about it as a cause of this particular fire.* Standard Oil Company of California attempts to belittle this elimination (Br. 28), by saying that the witness had already testified in answer to a hypothetical question that the exhaust pipe of the truck would not ignite the gasoline vapors and that the evidence was that the truck's motor was not running. It is true that Nielson testified the motor was not running, but the jury is not bound to accept such testimony as true. Also, there is at least one other possible cause of the fire in which the truck would be a participating agent and that is static electricity (R. Vol. II, p. 514).

Standard Oil Company of California (Br. 28) states that "The jury unquestionably understood the nature of the question and the hypothetical facts upon which it and the preceding questions answered by the witness were based. They were entitled to the benefit of the expert witness' opinion on the subject." The jury was entitled to the benefit of the witness' opinion based upon facts which were made known to the jury through the medium of the question itself. It would have been a very easy thing for counsel to have done as he did with other questions to make reference to the previous questions and let the witness and the jury know what facts were being assumed by the witness when his opinion was formed. Obviously Standard Oil Company of California cannot know what the jury understood. It is

to avoid any confusion in the minds of the jury as to the facts upon which the opinion is based that the rule has been evolved as set forth in appellant's brief.

At the top of page 29 of its brief, Standard Oil Company of California appears to contend that the burden under such circumstances is upon the cross-examiner to elicit from the witness the facts upon which the witness' opinion is based. The two cases cited for this proposition are authority merely for the proposition that wide latitude should be allowed in cross examination of an expert witness. There is nothing in either of the cases to indicate that the cross-examiner should be required to give to the Court and the jury the facts upon which the witness has been permitted to express his opinion on direct examination. This is the duty of the examiner on direct and not of the cross-examiner, and this is particularly true in view of the objection made which called distinct attention to the fact that such an expert was to be examined by hypothetical questions and that the question asked did not contain any facts upon which the witness could form or express his opinion.

Standard Oil Company of California misconstrues appellant's position with reference to the mention in appellant's brief of the fact that the witness Ryan was permitted to give an opinion upon the fundamental and basic question in the case. The appellant does not quarrel with the cases cited near the bottom

of page 29 of Standard Oil Company of California's brief insofar as they state that it is proper for an expert witness to give an opinion concerning the fundamental issue of a case. The fact that the witness Ryan was permitted to give a "positive and unqualified opinion on the fundamental and basic question in the entire case" was mentioned in appellant's brief for the purpose of showing particular prejudice to the appellant, since the improper question related to such an important phase of the case.

Standard Oil Company of California also contends that there could be no prejudice to appellant in view of the Court's instruction regarding expert testimony. (Br. 29). The instruction appears to be a standard instruction regarding expert testimony and gives the jury the right to determine the weight to be given to the testimony. This is fundamentally no different than the right which the jury has as to all testimony. The instruction itself states that opinion testimony of an expert is an exception to the general rule of evidence regarding opinions. Since it is an exception to the general rule, it cannot be overemphasized that the Courts have a positive duty to see that the opinions of expert witnesses are received only in response to properly framed questions and acceptable procedure.

The witness Ryan is no doubt a loyal employee of

Standard Oil Company of California, or at least one of its wholly owned subsidiaries. This can safely be assumed in view of his long continuous employment. Being human and subject to the frailties common to all humans, this witness particularly should not have been permitted to sift the evidence, accept and reject what he, and not the jury, saw fit to accept or reject and to base his opinion upon this fundamental question upon his own, and not the jury's, impression of the evidence. When such a witness is asked his opinion, there should be no question in the minds of the jury as to the basis of his opinion. Whether the positive opinion of the witness, "I can see no such possibility" was based upon the witness' hearing and observation of the testimony already offered or upon some unknown details of his long association with Standard Oil Company of California, it should not have been permitted. The factual basis of the opinion should have been made perfectly clear to the Court and to the jury.

To permit this witness, the only expert who testified at the trial and who was held out to the jury as being exceptionally well qualified, to express his opinion upon this fundamental issue in response to a question which called for his opinion based either upon his hearing and observation of the testimony already offered or upon no facts whatsoever was highly prejudicial and clearly reversible error.

CONCLUSION

Appellant submits that the plaintiff's motion for new trial should have geen granted and that the judgment and order appealed from should be reversed and the cause remanded for a new trial.

Respectfully submitted,

ORVILLE R. WILSON
Residing at Elko, Nevada

R. P. PARRY

J. R. KEENAN

T. M. ROBERTSON

JOHN H. DALY

Residing at Twin Falls, Idaho

Attorneys for Appellant.

No. 12668

IN THE

United States
Court of Appeals

For the Ninth Circuit

EDWARD HERZINGER, Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT, Appellees.

Supplement to Reply Brief of Appellant

Upon Appeal From the District Court of the United States For the District of Nevada

HON. ROGER T. FOLEY, District Judge

ORVILLE R. WILSON,
Residing at Elko, Nevada,
R. P. PARRY
J. R. KEENAN
T. M. ROBERTSON
JOHN H. DALY
Residing at Twin Falls, Idaho,
Attorneys for Appellant.

Filed ....., 1951

....., Clerk

INDEX

Page

Summary of Argument 2

Argument 2

I. Appellee Odermatt is not in a position to contend that he was an independent contractor 2

II. Plaintiff's Requested Instruction No. 1 (Refused) does not assume lack of care or skill on the part of Odermatt or his assistant when regarded in the light of the other instructions 3

III. There is no question in this case as to the proximate cause of the damage to appellant 3

IV. Nielson's absence from the truck was indeed connected with the fire and the destruction of plaintiff's property 4

Conclusion 6

IN THE

United States
Court of Appeals
For the Ninth Circuit

EDWARD HERZINGER, Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT, Appellees.

Upon Appeal From the District Court of the United States for the District of Nevada

Supplement to Reply Brief of Appellant

The Reply Brief of Appellant did not comment on the Brief for Appellee Odermatt because appellant had received neither Odermatt's brief nor any notice that Odermatt had been granted an extension of time within which to file his brief. It was therefore assumed that Odermatt did not intend to file a brief and appellant's reply brief was prepared immediately upon receipt of the Brief for Appellee Standard Oil Company of California. In most respects the contents of the Reply Brief of Appellant can be directed to the Brief for Appellee Odermatt. However, since the latter brief contains some discussion on points not raised by Standard Oil Company of California, and since in at least one respect the appellees are not in the same position, it is believed that a short response to Odermatt's biref should be made as a supplement to the reply brief of appellant.

SUMMARY OF ARGUMENT

I.

Appellee Odermatt is not in a position to contend that he was an independent contractor.

II.

Plaintiff's Requested Instruction No. 1 (Refused) does not assume lack of care or skill on the part of Odermatt or his assistant when regarded in the light of the other instructions.

III.

There is no question in this case as to the proximate cause of the damage to appellant.

IV.

Nielson's absence from the truck was indeed connected with the fire and the destruction of plaintiff's property.

ARGUMENT

I.

Appellee Odermatt is not in a position to contend that he was an independent contractor.

As shown in the Order on Pre-Trial Conference (R. Vol. 1, p. 18), appellee Odermatt admitted that the relationship between himself and Standard Oil Company of California was that of agent or employee, a position opposed that that taken by Standard Oil Company of California. Odermatt cannot now be heard to say, as stated on page 3 of his brief, that the evidence established him as an independent contractor.

II.

Plaintiff's requested instruction No. 1 (refused) does not assume lack of care or skill on the part of Odermatt or his assistant when regarded in the light of the other instructions.

On page 4 of his brief, Odermatt contends that Plaintiff's Requested Instruction No. 1 (Refused) was improper because it assumed lack of skill on the part of Odermatt and his assistant. It is well settled that no one instruction can contain all of the law in any case and that each of the instructions must be regarded in the light of all other instructions, and the Court, by Instruction No. 2 (R. Vol. 1, p. 26) so instructed the jury. The instructions of the Court adequately left the determination of whether or not Odermatt or his assistant exercised ordinary care or skill to the jury. This is particularly true in view of Instructions No. 14, No. 20-A and No. 23. (R. Vol. 1, pp. 33, 40 and 43).

III.

There is no question in this case as to the proximate cause of the damage to appellant.

On pages 10 and 11 of his brief, Odermatt discusses the applicability of the doctrine of res ipsa loquitur to the question of proximate cause. A conclusive distinction exists between the cases cited in the discussion in Odermatt's brief and the situation involved in this case. Appellant here, under the doctrine of res ipsa loquitur, was entitled to an inference that the proximate cause of the fire was some negli-

gent conduct on the part of Odermatt or his assistant. There is and can be no dispute on the question of whether or not the fire was the proximate cause of the damage to the plaintif. The Order on Pre-Trial Conference clearly shows that all parties to the action were in agreement that the fire destroyed the buildings and structures described in plaintif's complaint (R. Vol. 1, pp. 20 and 21). Consequently, the proximate cause of the damage to plaintiff was unquestionably the fire.

IV.

Nielson's absence from the truck was indeed connected with the fire and the destruction of plaintiff's property.

On page 14 of his brief Odermatt states that there is not the slightest room for a thought that Nielson's absence from the truck was in any way connected with the fire. Assuming Nielson's testimony to be true, who can say whether or not or how much gasoline oozed out of the hose which, according to Nielson, had been left with the nozzle end elevated and inserted in the filler pipe of the underground tank, and the hose itself placed for some unexplained reason upon the ground. It is particularly difficult to see how the stated position can be taken when it is remembered that the defendants' witness Ryan testified to the effect that he agreed with the standard safety rule that emergency hand extinguishing equipment should be provided and used when needed, and

that having an extinguisher could determine whether a fire was serious or not (R. Vol. II, p. 521).

Also, it is a matter of common knowledge that a fire which when under way cannot be controlled could often be extinguished if a man equipped with an extinguisher were standing by to immediately apply the chemicals before the fire spread. Irrespective of the causative factor in Nielson's absence from the truck, it is obvious that the damage to the appellant might certainly have been prevented had Nielson been, as was his duty, standing by the truck with an emergency hand extinguisher at the first appearance of the fire.

On page 15 of Odermatt's brief are statements to the effect that there is no question either as to whether or not the filling operations were completed or whether or not the truck end of the hose was attached to the truck at the time of the fire. It should be borne in mind that the witness Moseley testified (R. Vol. I, p. 106), in discussing what Nielson did when he came out of the bar room shortly after the fire started, "It appeared to me he was taking the hose off the truck," and on cross examination Mr. Moseley testified (R. Vol. I, p. 138) to the effect that Nielson must have detached the hose from the tank and that he went into the flames and turned off the flowing gasoline.

CONCLUSION

Appellant submits that the plantiff's motion for new trial should have been granted and that the judgment and order appealed from should be reversed and the cause remanded for a new trial.

Respectfully submitted,

ORVILLE R. WILSON
Residing at Elko, Nevada

R. P. PARRY

J. R. KEENAN

T. M. ROBERTSON

JOHN H. DALY

Residing at Twin Falls, Idaho
Attorneys for Appellant.

No. 12673

United States
Court of Appeals
for the Ninth Circuit.

COLES TRADING COMPANY, a Corporation,
Appellant,

vs.

SPIEGEL, INC., a Corporation,
Appellee.

Transcript of Record

**Appeal from the United States District Court,
District of Arizona.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12673

United States
Court of Appeals
for the Ninth Circuit.

COLES TRADING COMPANY, a Corporation,
Appellant,

vs.

SPIEGEL, INC., a Corporation,
Appellee.

Transcript of Record

**Appeal from the United States District Court,
District of Arizona.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer 22

Appeal:

Bond on 39

Designation of Parts of the Record Which Appellant Considers Necessary for the Consideration of the 102

Notice of 38

Statement of Points on Which Plaintiff-Appellant Intends to Rely on..... 41

Attorneys of Record 1

Bond on Appeal 39

Clerk's Certificate 98

Complaint 2

Exhibit A—Lease 6

B—The Sublease 15

Designation of Parts of the Record Which Appellant Considers Necessary for the Consideration of the Appeal..... 102

INDEX PAGE

Exhibits, Defendant's:

A—Letter From Coles Trading Company Dated July 23, 1945..... 68

B—Letter From Counsel Dated September 4, 1945, with Letter Enclosed Dated July 26, 1945..... 71

C—Minutes of Special Meeting of Board of Directors Held July 10, 1945.... 74

D—Copy of an Exercised Option by Dorris-Heyman Furniture Company ... 77

E—Agreement 78

F—Letter Dated October 17, 1945..... 86

Exhibits, Plaintiff's:

No. 1—Original Tax Receipt for 1948.... 51

2—Statement From Trust Dept. of the Valley National Bank..... 54

3—Cancelled Checks 55

4—Letter Dated August 3, 1949..... 57

Findings of Fact, Conclusions of Law and Judgment 29

Conclusions of Law 32

Findings of Fact 30

Judgment 32

INDEX PAGE

Minute Orders:
September 26, 1949—Order Re Trial..... 24
October 24, 1949—Order Re Reply Memorandum 25
December 22, 1949—Order That Defendant's Motion for Judgment on the Pleadings Is Denied 25
January 5, 1950—Order Re Trial..... 26
March 13, 1950—Order Re Oral Argument 28
March 20, 1950—Order That Record Show Case Is Submitted and Taken Under Advisement 28
May 24, 1950—Order That Defendant Have Judgment Herein 29
June 1, 1950—Order Re Objections to Proposed Findings of Fact and Conclusions of Law 33
June 26, 1950—Order That Record Show Said Matters Are Submitted and Taken Under Advisement 38
Notice of Appeal 38
Objections to Defendant's Findings and Conclusions 34
Reporter's Transcript 43
Statement of Points on Which Plaintiff-Appellant Intends to Rely on Appeal..... 41

INDEX PAGE

Witness, Defendant's:

Klein, William H.

—direct 66

—cross 89

—redirect 93

—recross 94

Witness, Plaintiff's:

Coles, Frank E.

—direct 44

—cross 61

ATTORNEYS OF RECORD

SHIMMEL, HILL AND HILL,
Title and Trust Building,
Phoenix, Arizona,
Attorneys for Appellant.

JENNINGS, STROUSS, SALMON AND TRASK,
Title and Trust Building,
Phoenix, Arizona,
Attorneys for Appellee.

In the District Court of the United States
for the District of Arizona

No. Civil 1306 - Phoenix

COLES TRADING COMPANY, a Corporation,

Plaintiff,

vs.

SPIEGEL, INC., a Corporation,

Defendant.

COMPLAINT

For its claim against defendant, plaintiff alleges:

I.

That plaintiff is a corporation, organized and existing under the laws of the State of Arizona, having its principal office and place of business at Phoenix, Maricopa County, Arizona; defendant is a corporation, organized and existing under the laws of the State of Delaware, but having an office and place of business at Phoenix, Maricopa County, Arizona; the matter in controversy herein exceeds in value the sum of $3,000.00, exclusive of interest and costs.

II.

Plaintiff is Lessee of certain land and premises located at the Southeast corner of East Adams Street and North First Street, Phoenix, Maricopa County, Arizona, under and by virtue of a lease in writing, executed and delivered on April 30, 1938, by and between J. W. Dorris and Sallie G. Dorris,

his wife, the then owners of the land and premises therein described, as Lessors, and Dorris-Heyman Furniture Company, an Arizona corporation, as Lessee; a full, true and correct copy of which said lease is hereto annexed, marked "Exhibit A," and made a part hereof; the option therein contained to extend the term of said lease has heretofore been exercised, and said lease now subsists in full force and effect; said lease is hereinafter referred to as "the Lease." Thereafter, said Dorris-Heyman Furniture Company, a corporation, by amendment of its Articles of Incorporation, changed its corporate name to "Coles Trading Company."

III.

On July 17, 1945, plaintiff subleased the land and premises described in the Lease to defendant, by an instrument in writing, a full, true and correct copy of which is hereto annexed, marked "Exhibit B," and made a part hereof; said sublease has not been terminated, but subsists in full force and effect, and will be hereinafter referred to as "the Sublease." To the Sublease, executed and delivered as aforesaid, was attached a copy of the Lease.

IV.

The Lease contains the following provision:

"The Lessee covenants and agrees that if at any time during the term of this lease, or the extended term, if the option to extend is exercised, the Lessors shall be required to pay property taxes levied by the state, county, city or any subdivision of

either of them in any year in excess of the sum of Fifteen Thousand ($15,000.00) Dollars, upon the entire premises covered by this lease, and the lease to Goldwater Mercantile Company, the Lessee during each of said years that the Lessors are so required to pay taxes in excess of Fifteen Thousand ($15,000.00) Dollars, will pay in addition to the regular monthly rental then payable under the provisions of this lease or extension thereof, such proportion of the excess of said taxes over Fifteen Thousand ($15,000.00) Dollars, as the rental payable during the original term of this lease bears to the monthly rental payable during the original term of said Goldwater Mercantile Company Lease."

V.

For the calendar year 1948, property taxes, as regularly levied and assessed by the State of Arizona and its political subdivisions upon and against the leased and subleased premises, exceeded the sum of $15,000.00; and on November 13, 1948, The Valley National Bank of Phoenix, as Trustee Under the Wills of J. W. Dorris and Sallie G. Dorris, both deceased, successor in interest to said Lessors, made written demand on plaintiff for payment to it of the sum of $4,517.51, representing that proportion of such excess of taxes payable by Lessee under and by virtue of the provision hereinabove set forth of the Lease.

VI.

Under and by virtue of the provisions of the Sublease, defendant subleased from plaintiff the land and premises described in the Lease and the Sublease, subject to all of the terms of the Lease, including the specific provision hereinabove set forth; it having been, at all times, the intention of plaintiff and defendant, in the execution and delivery of the Sublease, that defendant assume and perform all terms and conditions of the Lease by Lessee to be performed, excepting only those five covenants or conditions designated "(a), (b), (c), (d)" and "(e)," as expressly set forth and contained in the Sublease.

VII.

On or about November 23, 1948, plaintiff made demand upon defendant for the payment by it to said The Valley National Bank, as Trustee, of said sum of $4,517.51, payable pursuant to the terms and conditions of the Lease and the Sublease; that defendant failed and refused, and still fails and refuses, to pay said amount or any part thereof.

VIII.

Plaintiff has heretofore paid to The Valley National Bank, Trustee as aforesaid, the sum of $4,517.18, representing the excess of taxes due and payable by Lessee pursuant to the terms of the Lease and the Sublease.

Wherefore, plaintiff prays judgment against defendant for the sum of $4,517.18, together with in-

terest thereon at the rate of 6% per annum from February 23, 1949, until paid, and its costs herein.

SHIMMEL, HILL & HILL,

By /s/ BLAINE B. SHIMMEL,
Attorneys for Plaintiff.

Exhibit A

Lease

This Indenture, made this 30th day of April, 1938, by and between J. W. Dorris and Sallie G. Dorris, his wife, of Phoenix, Arizona, hereinafter called Lessors, and Dorris-Heyman Furniture Company, a corporation, organized and existing under the laws of Arizona, and having its office and principal place of business at the City of Phoenix, Arizona, and hereinafter called the Lessee, Witnesseth:

The Lessors do by these presents, and in consideration of the payments of rent, promises, covenants and agreements of the Lessee hereinafter contained, lease, demise and let unto the said Lessee, the following described premises, situated in the County of Maricopa, State of Arizona, to wit:

The North Half (N½), and the East twenty-three (23) feet of the South Half (S½) of the basement, including the area under the West and North sidewalks adjacent to the said North Half (N½) the North Half (N½) of the first and second floors; of that certain building at the southeast corner of First and Adams Streets, located on lots Four (4), Five (5) and Six (6), Block Twenty (20), in the City of Phoenix; it being

understood that the East twenty-three (23) feet of the South Half (S½) of said basement is subject to the terms of an agreement of even date between Lessee and Goldwater Mercantile Company, lessee of the balance of said building.

For the term commencing May 1st, 1938, and ending September 30th, 1949, at and for the monthly rental of Eighteen Hundred Fifty ($1850.00) Dollars per month, payable on the fifth day of each and every month during the term beginning on the fifth day of May, 1938. All payments shall be made to the credit of the Lessors at The Valley National Bank, in Phoenix, or in such bank or trust company in said City of Phoenix, as the Lessors may in writing, addressed and delivered to the Lessee, hereinafter designate.

The Lessee hereby leases the said premises for the term above mentioned at and for the rental above specified, and hereby agrees and binds itself to pay said rental in manner aforesaid, promptly, without demand made therefor, and to do and perform all of its promises, covenants and agreements herein contained.

The Lessee hereby accepts the leased premises and the air cooling system, the heating system therein, all machinery, the elevators, boilers, sidewalks, roof, window glass, plate glass and toilets, as being in satisfactory, tenantable condition, and hereby agrees to keep the same in repair and good, tenantable condition, making such replacements as may be necessary during the term of this lease.

The Lessee agrees upon the end of the term, or other termination of the lease, to surrender the premises to the Lessors in as good condition as the same now are, reasonable wear and tear excepted.

Notwithstanding the provisions herein contained, repairs or replacements made necessary by fire or the elements, such as may be provided for by the eight point insurance policy in common use, are not required to be made by the Lessee. The Lessee agrees to reimburse Lessor for the excess of premium on eight point policy over premium on fire policy.

To assure the availability of funds to make repairs or replacements caused by boiler explosion, Lessee agrees to carry boiler explosion insurance.

The Lessee will at all times during the term of this lease, keep the leased premises free and clear of all rubbish and waste material of a combustible nature, except in the shipping, packing and repair and shop rooms and on the fourth floor.

The Lessee may make any changes in the leased premises that are not detrimental to the building, provided that notice of intention to make such changes and of the nature thereof shall be given the Lessors or their agent not less than ten (10) days before the making thereof.

The Lessee shall have the right, at any time during the continuance of this lease, to remove any and all fixtures placed by it upon said premises, insofar as the same can be done without damage to the premises, provided all sums due for rent have been paid.

The Lessee will at all times during its occupancy of said premises hereunder save and keep harmless the Lessors from liability, loss, cost, damage or expense by reason of any accidents happening to any employee, customer or other person or persons invited or allowed by it to use the said leased premises, or to be in or about the same and to that end to carry a policy or policies of insurance indemnifying the Lessors either separately or jointly with the Lessee against such loss, cost, damage or expense, in a responsible liability company or companies, to an amount not less than Ten Thousand ($10,000.00) Dollars.

The Lessee hereby covenants and agrees not to let or underlet the whole or any part of said premises, or to permit any other person to occupy the same, and not to assign, voluntarily or involuntarily, or mortgage, pledge or otherwise transfer this lease or any interest therein without the written consent of the Lessors first had and obtained, and any such written consent given by the Lessors shall not waive consent in writing to any succeeding assignment, mortgage, pledge, transfer or sublease and upon such sale, transfer or attempted sale or transfer of this lease, or of the leasehold premises, except as above provided, whether voluntary or involuntary, or the subletting of the whole or any part of said premises without the written consent of the Lessor first had and obtained, or upon the failure of the Lessee to pay any installment of rent at the time the same becomes due, as hereinbefore provided,

or upon the violation of the Lessee of any of the terms, covenants, and conditions of this lease, or should the Lessee make an assignment for the benefit of creditors, commit an act of bankruptcy, be sold out or attached by Sheriff's sale, or other compulsory procedure, process or order of the court, or become a party to any court procedure contemplating a reorganization, then and in any such case, the whole rent for any unexpired portion of the term of this lease, or any continuation thereof, shall at the option of the Lessors at once become due and payable as if by the terms of this lease it were made payable in advance, and shall be paid out of the proceeds of such assignment, sale or procedure, or at the option of the Lessors, they may declare this lease void and at an end for and on account thereof, or for or on account of any violation of the terms and conditions thereof by the Lessee, and this lease shall thereupon be immediately terminated and cancelled and possession of the premises surrendered to the lessors or their grantee. Nevertheless, the Lessors will not refuse to grant permission in writing to the Lessee to sublet all or portions of said premises during the term of this lease to such person or persons as may be deemed by the Lessors to be satisfactory as tenants of the said premises, upon request being made to them by the said Lessee for the privilege of so subletting the same.

This lease shall not be terminated if the leased premises are injured or damaged by fire, the elements, or any other cause to such extent as to be untenable or unfit for occupancy, but if said premises are so damaged by fire or the elements as to be

untenantable or unfit for occupancy, no rent shall be payable during the period that said premises are so untenantable, or unfit for occupancy, and the Lessors shall rebuild or restore said premises with all convenient speed, and when said premises are so rebuilt or restored, payment of the rent shall be resumed; provided, that if said premises are wholly destroyed, or so greatly damaged that they cannot be rebuilt or restored to a condition fit for occupancy within a period of six (6) months, this lease shall terminate and both parties shall be released from future obligations thereof; provided, further, that Lessee shall have the right to require the leased premises to be rebuilt if at the time such damage or destruction occurs or within thirty (30) days thereafter the Lessee shall remain obligated to pay rent (after allowance of six months to rebuild) for not less than three and one-half years.

The Lessors shall at all reasonable times have the right to enter upon the leased premises and every part thereof for the purpose of inspecting the same.

It is understood that the remainder of the premises covered in part by this lease are covered by a lease to Goldwater Mercantile Company, a corporation; that the heating system for the leased premises is and will be jointly operated, repaired and maintained by the two tenants and that there are certain other respects in which said two tenants of the lessors have cooperated and will hereafter cooperate for their mutual benefit. The Lessors hereby agree that said tenants may enter into such

arrangements between themselves as may be mutually satisfactory to them which arrangements may include the use at times or permanently of certain facilities and portions of the premises jointly, and the Lessors hereby agree that they will cooperate in carrying out said mutual arrangements between said tenants, but any such arrangements shall not jeopardize the right of the Lessors to the full amount of rental herein agreed to be paid nor the right to require full performance of the Lessee of its covenants to repair and make necessary replacements on the leased premises. Unless otherwise agreed upon between said tenants, repairs and replacements on the premises not directly related to the building shall be made by the Lessee herein, for the North Half (N½) of said Lots Four (4), Five (5) and Six (6), in said Block Twenty (20). The repairs and replacements on the roof and the third and fourth floors shall be made wholly by the Lessee in this lease.

The Lessee covenants and agrees that if at any time during the term of this lease, or the extended term, if the option to extend is exercised, the Lessors shall be required to pay property taxes levied by the state, county, city or any subdivision of either of them in any year in excess of the sum of Fifteen Thousand ($15,000.00) Dollars, upon the entire premises covered by this lease, and the lease to Goldwater Mercantile Company, the Lessee during each of said years that the Lessors are so required to pay taxes in excess of Fifteen Thousand ($15,000.00) Dollars, will pay, in addition to the

regular monthly rental then payable under the provisions of this lease or extension thereof, such proportion of the excess of said taxes over Fifteen Thousand ($15,000.00) Dollars, as the rental payable during the original term of this lease bears to the monthly rental payable during the original term of said Goldwater Mercantile Company lease.

It is a part of the consideration for this lease that the lease between the parties hereto of the premises covered hereby, dated the 4th day of October, 1928, and all agreements and understandings, written or verbal, pertaining to the leased premises, shall be and hereby are terminated as of April 30th, 1938, and from and after said date this lease shall be the only agreement between the Lessors and the Lessee pertaining to the leased premises hereinbefore described, it being understood and agreed that the extension of the term, the option for an additional period hereinafter granted and the reduction in rent, are the consideration for releasing the Lessors from duties and obligations heretofore imposed upon them by existing leases and agreements.

In consideration of the execution of this lease, the Lessors hereby grant to the lessee the right, privilege and option to extend the term of this lease for the period of ten (10) years from and after September 30, 1949, at a rental of Twenty-one Hundred and Fifty ($2150.00) Dollars per month. Said option may be exercised only by the Lessee giving written notice to the Lessors before September 30th, 1948.

All of the covenants, provisions and agreements of this lease shall remain in full force and effect and shall be carried over into and during the extension period in all respects as in this lease provided, the only change being the increase in monthly rental.

All of the terms and conditions hereof shall be binding upon the heirs, successors and assigns of the parties hereto.

In Witness Whereof, the Lessors have hereunto set their hands and the Lessee has caused these presents to be executed in its corporate name and by its officers thereunto duly authorized, and its corporate seal to be hereunto affixed the day and year first above written.

J. W. DORRIS,
SALLIE G. DORRIS,
Lessors.

[Corporate Seal]

DORRIS-HEYMAN FURNITURE COMPANY,
By F. E. COLES,
President, Lessee.

Attest:

J. H. COLES,
Secretary.

State of Arizona,
County of Maricopa—ss.

The foregoing instrument was acknowledged before me, Harold L. Divelbess, a Notary Public in and for the State and County aforesaid, on this 3rd

day of May, 1938, by J. W. Dorris and Sallie G. Dorris, his wife.

[Seal] HAROLD L. DIVELBESS,
Notary Public.

My Commission expires December 28, 1940.

State of Arizona,
County of Maricopa—ss.

The foregoing instrument was acknowledged before me, Harold L. Divelbess, a Notary Public in and for the State and County aforesaid, on this 3rd day of May, 1938, by F. E. Coles, as President and J. H. Coles, as Secretary of Dorris-Heyman Furniture Company.

[Seal] HAROLD L. DIVELBESS.

My Commission expires December 28, 1940.

Exhibit B
(The Sublease)

This Indenture, made this 17th day of July, 1945, by and between the Dorris-Heyman Furniture Co., a corporation, organized and existing under the laws of Arizona, and having its office and principal place of business in the City of Phoenix, Arizona, hereinafter called Lessor, and Spiegel, Inc., a corporation, organized and existing under the laws of Delaware, and having its principal place of business in the City of Chicago, Illinois, hereinafter called the Lessee:

Witnesseth:

The Lessors do by these presents, and in consideration of the payments of rent, promises, covenants and agreements of the Lessee hereinafter contained, sub-lease, demise and sub-let unto the said Lessee, the following described premises, situated in the County of Maricopa, State of Arizona, to wit:

The North Half (N½), and the East twenty-three (23) feet of the South Half (S½) of the basement, including the area under the West and North sidewalks adjacent to the said North Half (N½); the North Half (N½) of the first and second floors; and all of the third and fourth floors; of that certain building at the southeast corner of First and Adams Street, located on Lots Four (4), Five (5) and Six (6), Block Twenty (20), in the City of Phoenix; it being understood that the East twenty-three (23) feet of the South Half (S½) of said basement is subject to the terms of an agreement of even date between Lessee and Goldwater Mercantile Company, lessee of the balance of said building.

commonly known as the southeast corner of East Adams and First Street, Phoenix, Arizona, on which is located, and from which is operated the business of the Dorris-Heyman Furniture Co., for the term commencing August 1, 1945, and ending September 30, 1959, at and for a monthly rental for said demised premises, payable on the first day of each month in advance for the first fifty (50) months, commencing August 1, 1945, and ending September 1, 1949, the sum of Three Thousand Eight Hundred and Fifty Dollars ($3,850.00), and

for the next fifty-five (55) months, commencing October 1, 1949, and ending April 30, 1954, the sum of Four Thousand One Hundred and Fifty Dollars ($4,150.00), and for the remaining sixty-five (65) months, commencing May 1, 1954, and ending September 1, 1959, the sum of Three Thousand and Fifty Dollars ($3,050.00), subject to the terms of, and with all the rights, privileges and benefits granted the Dorris-Heyman Furniture Co. under, a certain lease dated April 30, 1938, by and between J. W. Dorris and Sallie G. Dorris, his wife, as Lessors, and Dorris-Heyman Furniture Co., an Arizona corporation, as Lessee, demising the above-described premises (hereinafter sometimes referred to as "over-lease"), a photostatic copy of which over-lease is attached hereto and made a part hereof.

It is expressly understood and agreed, however, that anything in said over-lease to the contrary notwithstanding:

(a) Lessor shall be responsible for any structural repairs and for any extraordinary repairs not due to the negligence of the Lessee or its agents which it may be necessary to make on the building located on said demised premises and Lessee shall be obligated, except as to such structural or extraordinary repairs, to maintain said building in good condition and repair, ordinary wear and tear and fire and other casualties excepted.

(b) Lessee shall not be in default on rent until fifteen (15) days after notice, during which time Lessee shall fail to cure the default, or on matters

other than rent, until thirty (30) days after notice, during which time Lessee fails to cure default.

(c) In the event of fire, rent shall abate in proportion to the amount of the demised premises no longer usable for business purposes and it shall be the duty of the Lessor to restore the demised premises promptly, and upon failure of Lessor to restore the demised premises promptly, and upon failure of Lessor to so restore the demised premises, Lessee shall have the right at its election to cancel the lease or to restore the demised premises and to deduct the cost of restoration from rental due or to become due hereunder.

(d) In the event Lessor shall owe Lessee any sum or sums of money from time to time pursuant to the terms, promises, covenants, considerations and guarantees of this lease or of that certain purchase agreement dated July 17, 1945, between the Dorris-Heyman Furniture Co. as Seller and Spiegel, Inc., as Purchaser, Lessee shall notify Lessor, and Lessor agrees to forthwith pay such sum or sums of money. In the event that Lessor shall fail from time to time to pay said amount or amounts within twenty (20) days after receiving such notice, then Lessee shall be permitted to withhold rental due or which shall become due hereunder.

(e) In the event that less than Twenty-Five Per Cent (25%) of the demised premises is taken by eminent domain, rental shall abate proportionately. If Twenty-Five Per Cent (25%) or more of the premises are taken by eminent domain, Lessee shall have the option to cancel the lease or to continue as

Lessee at a rental abated proportionate to the percentage of the premises taken by eminent domain. All the damage awards resulting from the taking of the demised premises by eminent domain shall belong to the Lessor, except that the Lessee shall be entitled to that portion of the award made for loss of business or for the restoration of the demised premises or fixtures insofar as Lessee shall, and insofar as it shall be Lessee's duty or right to restore the premises or fixtures.

It is further expressly understood and agreed that Lessor will use its best efforts to obtain the consent of J. W. Dorris and Sallie G. Dorris, or their successors, assigns, administrators, executors, or trustees of their estates, if any, as Lessors, under said over-lease, to the sub-letting or assigning by the Lessee hereunder to any subsidiary, affiliate or successor or to any other individual, partnership, or corporation which is financially responsible, on the condition that Lessee shall not thereby be relieved of any liability, and in the event such consent is obtained, then, and in that event, Lessor shall grant to Lessee the right to sub-let or assign the demised premises to any subsidiary, affiliate or successor or to any other individual, partnership, or corporation which is financially responsible.

It is further expressly understood and agreed that Lessor will use its best efforts to obtain the consent of J. W. Dorris, and Sallie G. Dorris, or their successors, assigns, administrators, executors, or trustees of their estates, if any, as Lessor under said over-lease to allow Lessee to enter into such

lease agreements for leased departments as it shall see fit, and in the event such consent is obtained, then, and in that event, Lessor shall grant to Lessee the right to enter into such agreements for leased departments as Lessee shall see fit.

Lessor agrees to deliver to the Lessee on or before July 31, 1945, an exercised option to renew said over-lease and it is expressly understood and agreed that Lessee may deliver said exercised option to the Lessor under said over-lease.

Notices required to be sent under this sub-lease shall be sent to the Lessee at 1061 West 35th Street, Chicago 9, Illinois, attention: Mr. Walter A. Gatzert, Secretary, and to the Lessor addressed as follows: Mr. F. E. Coles, 90 North Country Club Drive, Phoenix, Arizona, or to any other addresses that either party may in writing designate.

In Witness Whereof, the Lessor has caused these presents to be executed in its corporate name and by its duly authorized officers, and its corporate seal to be hereto affixed, and the Lessee has caused these presents to be executed in its corporate name and by its duly authorized officers, and its corporate seal to be hereunto affixed, the day and year first above written.

DORRIS-HEYMAN FURNITURE CO.,
F. E. COLES,
President.

[Corporate Seal]
Attest:

J. J. COLLINS,
Secretary.

SPIEGEL, INC.,
M. J. SPIEGEL, JR.,
President.

[Corporate Seal]

Attest:

WALTER A. GATZERT,
Secretary.

State of Arizona,
County of Maricopa—ss.

The foregoing instrument was acknowledged before me Blaine B. Shimmel, a Notary Public in and for the State and County aforesaid, on this 23rd day of July, 1945, by F. E. Coles as President and J. J. Collins as Secretary of Dorris-Heyman Furniture Co.

[Notarial Seal]

BLAINE B. SHIMMEL,
Notary Public.

My Commission expires May 31, 1947.

State of Illinois,
County of Cook—ss.

The foregoing instrument was acknowledged before me, F. E. Anderson, a Notary Public in and for the State and County aforesaid on this 17th day of July, 1945, by Modie J. Spiegel, Jr., as President and Walter A. Gatzert as Secretary of Spiegel, Inc.

[Notarial Seal]

F. E. ANDERSON,
Notary Public.

My Commission expires 10/14/45.

[Endorsed]: Filed April 18, 1949.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Spiegel, Inc., a corporation, by Jennings, Strouss, Salmon & Trask, as attorneys, and for its answer to the complaint of the plaintiff filed herein, admits, denies and alleges:

First Defense

For its first defense, said defendant avers that the complaint of the plaintiff fails to state a claim upon which relief can be granted.

Second Defense

I.

Answering Paragraphs I, II, III and IV of plaintiff's complaint this defendant admits the allegations therein contained.

II.

Answering Paragraph V of plaintiff's complaint this defendant is without knowledge or information sufficient to form a belief as to the truth thereof.

III.

Answering Paragraph VI of plaintiff's complaint this defendant alleges that the provisions of the lease and sublease referred to in said paragraph are specifically set out in Exhibits "A" and "B" attached to plaintiff's complaint; that said provisions are plain and unambiguous and set forth correctly the terms of said instruments and the rights and obligations of plaintiff and defendant thereto. Further answering said paragraph this defendant denies, each and every, all and singular, the allegations therein not expressly admitted herein.

IV.

Answering Paragraph VII of plaintiff's complaint this defendant admits that plaintiff made demand upon defendant as referred to in said paragraph and that this defendant has failed and refused and still fails and refuses to pay the amount of said demand or any part thereof, but the defendant denies that the sum referred to in said paragraph is payable pursuant to the terms and conditions of the sublease between this plaintiff and this defendant, and further denies that this defendant has any duty or obligation to pay the sum referred to in said paragraph.

V.

Answering Paragraph VIII of plaintiff's complaint this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

Wherefore, having fully answered, said defend-

ant prays that the plaintiff take nothing by its complaint and that this defendant have its costs and disbursements herein expended.

JENNINGS, STROUSS,
SALMON & TRASK,

By /s/ O. M. TRASK,
Attorneys for the Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 9, 1949.

In the United States District Court
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District Judge, Presiding.

MINUTE ENTRY OF MONDAY
SEPTEMBER 26, 1949

Plaintiff's Motion to Set comes on regularly for hearing this day. Rouland W. Hill, Esq., is present for the plaintiff. Ozell Trask, Esq., is present for the defendant.

It Is Ordered that this case be and it is set for trial January 5, 1950, at 10:00 o'clock a.m.

In the United States District Court
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District Judge, Presiding.

MINUTE ENTRY OF MONDAY
OCTOBER 24, 1949

The Defendant's Motion for Judgment on Pleadings comes on regularly this day. Rouland W. Hill, Esquire, appears for the plaintiff. Ozell Trask, Esquire, appears for the defendant.

Said Defendant's Motion for Judgment on Pleadings is now argued by respective counsel, submitted and taken under advisement.

It Is Ordered that the defendant be and it is allowed five days to file reply memorandum.

In the United States District Court
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District Judge, Presiding.

MINUTE ENTRY OF THURSDAY
DECEMBER 22, 1949

It Is Ordered that the Defendant's Motion for Judgment on the Pleadings be and it is denied.

In the United States District Court
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District Judge, Presiding.

MINUTE ENTRY OF THURSDAY
JANUARY 5, 1949

This case comes on regularly for trial this day. Blaine B. Shimmel, Esq., and Rouland W. Hill, Esquire, appear for the plaintiff. Ozell Trask, Esquire, is present for the defendant. Louis L. Billar is present as official reporter.

Both sides announce ready for trial.

Plaintiff's Case

Frank E. Coles is now sworn and examined on behalf of the plaintiff.

The following plaintiff's exhibits are now admitted in evidence:

1. Tax statements
2. Statement
3. Cancelled checks.
4. Letter

Whereupon, the plaintiff rests.

Defendant's Case

William H. Klein is now sworn and examined on behalf of the defendant.

The following defendant's exhibits are now admitted in evidence:

A. Letter

B. Letter

C. Minutes of meeting

D. Photostat copy of option

E. Photostat copy of agreement

F. Copy of letter

On motion of counsel for defendant, It Is Ordered that the defendant be allowed to substitute photostat copies in lieu of defendant's original exhibits A and B, which is now done.

And the defendant rests.

Both sides rest.

Counsel for plaintiff waives opening brief. It Is Ordered that the defendant be allowed 30 days to file answering brief and plaintiff 20 days to reply, subject to oral argument thereafter.

In the United States District Court
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District Judge, Presiding.

MINUTE ENTRY OF MONDAY
MARCH 13, 1950

On motion of Rouland W. Hill, Esquire, counsel for the defendant,

It Is Ordered that this case be and it is set for oral argument Monday, March 20, 1950, at 10:00 o'clock a.m.

In the United States District Court
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District Judge, Presiding.

MINUTE ENTRY OF MONDAY
MARCH 20, 1950

This being the time heretofore fixed for oral argument herein, Blaine Shimmel, Esquire, appears as counsel for the plaintiff and Ozell, Trask, Esquire, is present as counsel for the defendant.

The case is now argued by respective counsel, and

It Is Ordered that the record show that this case is now submitted and taken under advisement.

In the United States District Court
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District Judge, Presiding.

MINUTE ENTRY OF WEDNESDAY
MAY 24, 1950

This cause having been submitted and taken under advisement,

It Is Ordered that the defendant have judgment herein.

In the District Court of the United States
for the District of Arizona

No. 1306—Phoenix

COLES TRADING CORPORATION, a Corporation,

Plaintiff,

vs.

SPIEGEL, INC., a Corporation,

Defendant.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

The above-entitled cause came on regularly for trial on the 5th day of January, 1950, before the Court sitting without a jury, a jury having been waived. Shimmel, Hill and Hill, by Mr. Blaine B.

Shimmel, appeared as counsel for the plaintiff, and Jennings, Strouss, Salmon & Trask, by O. M. Trask, appeared as counsel for the defendant. The Court having heard the testimony and having examined the proofs offered by the respective parties, the cause having been argued by counsel and submitted to the Court for decision, and the Court being fully advised in the premises, now makes its findings of fact and conclusions of law and renders judgment as follows:

Findings of Fact

1. The plaintiff is a corporation organized and existing under the laws of the State of Arizona, and is a citizen and resident of Phoenix, Maricopa County, Arizona. The defendant is a corporation organized and existing under the laws of the State of Delaware and is a citizen and resident of said state but with a place of business at Phoenix, Maricopa County, Arizona. The matter in controversy is in excess of the value of $3,000.00, exclusive of interest and costs.

2. On April 30, 1938, J. W. Dorris and Sallie G. Dorris, his wife, entered into a lease in writing with Dorris-Heyman Furniture Company, an Arizona corporation, as lessee. Said lease was for a term ending September 30, 1949, with an option to renew said lease for a period of ten years from and after September 30, 1949, which option has been exercised and the term extended.

3. Said lease contained the following provision:

"The Lessee covenants and agrees that if at any time during the term of this lease, or the extended term, if the option to extend is exercised, the Lessors shall be required to pay property taxes levied by the state, county, city or any subdivision of either of them in any year in excess of the sum of Fifteen Thousand ($15,000.00) Dollars, upon the entire premises covered by this lease, and the lease to Goldwater Mercantile Company, the Lessee during each of said years that the Lessors are so required to pay taxes in excess of Fifteen Thousand ($15,000.00) Dollars, will pay in addition to the regular monthly rental then payable under the provisions of this lease or extension thereof, such proportion of the excess of said taxes over Fifteen Thousand ($15,000.00) Dollars, as the rental payable during the original term of this lease bears to the monthly rental payable during the original term of said Goldwater Mercantile Company lease."

4. Subsequently and on July 17, 1945, Dorris-Heyman Furniture Company entered into a sublease with the defendant, Spiegel, Inc., a corporation, which sublease contained the following provision:

"Subject to the terms of, and with all the rights, privileges and benefits granted the Dorris-Heyman Furniture Company under a certain lease dated April 30, 1938."

5. The sublease by Dorris-Heyman Furniture Company to Spiegel, Inc., contained no covenant, stipulation or provision under the terms of which the sublessee promised and agreed to pay any excess

of taxes which might accrue under the provision in the original lease as quoted in Paragraph 3, supra.

6. There was no intention on the part of the parties to the sublease that the sublessee, Spiegel, Inc., should assume and agree to pay any such excess of taxes which might accrue under the quoted provision of the original lease.

7. For the calendar year 1948, there was an excess of taxes under the quoted provision of the original lease and the original lessee's portion of said excess of taxes was the sum of $4,517.51 which was paid by said original lessee.

8. The lessee in the original lease, Dorris-Heyman Furniture Company, has changed its name prior to the filing of this action to the name of Coles Trading Company, a Corporation.

Conclusions of Law

1. The Court has jurisdiction over the parties and the subject matter involved in the controversy.

2. No legal obligation has been proved by the plaintiff by writing or otherwise, requiring the defendant, Spiegel, Inc., a corporation, to pay any excess of taxes which might accrue to the original lessee under the provision of said original lease.

Judgment

It Is Ordered, Adjudged and Decreed that the plaintiff take nothing by its complaint and that the defendant have judgment thereon, together with its costs and disbursements therein expended.

Done in Open Court this 3rd day of July, 1950.

/s/ DAVE W. LING,
Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed and Docketed July 3, 1950.

In the United States District Court
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District Judge, Presiding.

MINUTE ENTRY OF THURSDAY JUNE 1, 1950

On Motion of Blaine B. Shimmel, Esquire, counsel for the plaintiff,

It Is Ordered that the plaintiff be allowed until June 10, 1950, to file objections to Defendant's Proposed Findings of Fact and Conclusions of Law.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW; AND PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Objections to Defendant's Findings and Conclusions

I.

Plaintiff objects to Proposed Finding of Fact Number 6, for the reason that the same is not sustained by any competent evidence and is contrary to the evidence.

II.

Plaintiff objects to Proposed Conclusion of Law Number 2, upon the ground that the same is not sustained by any Finding of Fact, or any competent evidence in the record, and is contrary to the evidence.

III.

Plaintiff objects to the Proposed Findings and Conclusions as a whole, for the reason that the same are fragmentary and incomplete, and do not constitute either findings or conclusions upon the major issues formed by the pleadings and raised by the evidence.

Plaintiff's Proposed Findings of Fact

1. That the sublease attached as Exhibit B to plaintiff's complaint, was drafted by defendant's

attorney, and executed in defendant's office at Chicago, Illinois.

2. That, in the negotiations leading up to the drafting by defendant of said sublease in defendant's office at Chicago, Illinois, defendant had before it a copy of the overlease attached as Exhibit A to plaintiff's complaint; that upon examination of the provisions of said overlease, defendant expressly objected to certain provisions thereof, which its officers and agents insisted be "excepted" in the sublease; that defendant did not object to any other of the provisions of said overlease, or urge any other or further exceptions.

3. That following the execution of the sublease on July 17, 1945, defendant went into possession of the leased premises, continued to occupy the same for a period of approximately four years, during which time it paid the rent and performed all of the other provisions of the sublease by sublessee to be performed, and also did the following acts in performance of express covenants of the overlease, which were not excepted in the sublease:

(a) It paid the excess of fire insurance premium.

(b) It paid boiler insurance premium.

(c) It cooperated with Goldwater and paid one-half of the cost of operating the heating plant.

(d) It removed rubbish from the premises.

(e) It kept the premises in repair, except structural repair.

4. That, in executing the sublease to defendant, plaintiff retained no reversionary interest in the leased premises.

Plaintiff's Proposed Conclusions of Law

1. That the overlease and the sublease, attached as Exhibits A and B, respectively, to plaintiff's complaint, comprise, and are to be construed as, one instrument.

2. That said instruments should be construed to give effect to every clause and provision contained in the overlease and sublease.

3. That the overlease and the sublease should be construed most strongly against defendant, whose agent drafted the same.

4. That the overlease and the sublease, construed as one instrument, are ambiguous, in that the sublease contains no express covenant providing that the sublessee shall assume and be bound by any of the covenants of the overlease; while, at the same time, said sublease provides that, anything in said overlease (attached thereto and expressly made a part thereof) to the contrary notwithstanding, certain specific covenants of the overlease were not to be assumed by, or be binding upon, sublessee.

5. That, by incorporating in the sublease certain specific covenants of the overlease to which it objected and by which it refused to be bound, defendant, by implication, assumed, and agreed to be bound

by, the remaining covenants of the overlease to which it did not so object.

6. That, by its conduct in assuming and performing for four years, all of the covenants of the overlease which it did not specifically except in the sublease, defendant placed upon the instruments a construction which is now binding upon it, and which now estops it to deny that it assumed and agreed to be bound by the covenants of the overlease providing for the payment of excess taxes.

7. That the sublease is, in legal effect, an assignment of the leasehold interest of the overlease, and obligates the sublessee to perform all of the covenants of the overlease, excepting only those which it specifically excepted or superseded in the sublease.

SHIMMEL, HILL & HILL,

By /s/ BLAINE B. SHIMMEL,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed June 12, 1950.

In the United States District Court for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District Judge, Presiding.

Minute Entry of Monday, June 26, 1950

The defendant's Proposed Findings of Fact and Conclusions of Law and Judgment and Plaintiff's Objections to Defendant's Proposed Findings of Fact and Conclusions of Law and Plaintiff's Proposed Findings of Fact and Conclusions of Law come on regularly for hearing this date.

Blaine B. Shimmel, Esquire, appears for the plaintiff. Ozell Trask, Esquire, is present for the defendant.

Argument is now had by respective counsel, and

It Is Ordered that the record show that said matters are submitted and taken under advisement.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Coles Trading Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on July 3, 1950.

Dated this 31st day of July, 1950.

SHIMMEL, HILL & HILL and
BLAINE B. SHIMMEL,

By /s/ BLAINE B. SHIMMEL,
Attorneys for Plaintiff.

A copy of the foregoing Notice of Appeal was served on us this 31st day of July, 1950.

JENNINGS, STROUSS,
SALMON & TRASK and
O. M. TRASK,

By /s/ O. M. TRASK,
Attorneys for Defendant.

[Endorsed]: Filed July 31, 1950.

[Title of District Court and Cause.]

BOND ON APPEAL

State of Arizona,
County of Maricopa—ss.

Know All Men by These Presents:

That Coles Trading Company, a corporation, duly organized and existing under the laws of the State of Arizona, as principal, and Fidelity and Deposit Company of Maryland, as surety, are firmly held and bound unto the above-named Spiegel, Inc., a corporation, in the sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said Spiegel, Inc.,

a corporation, for the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Whereas, on July 3, 1950, a judgment was entered in the above-entitled proceeding that the plaintiff take nothing by its complaint and that the defendant have judgment thereon; and

Whereas, the plaintiff and appellant, Coles Trading Company, a corporation, feeling aggrieved thereby, appeals to the United States Court of Appeals for the Ninth Circuit.

Now, Therefore, the condition of this obligation is such that, if the aforesaid judgment is affirmed or modified by the appellate court, or if the appeal is dismissed, the plaintiff and appellant, Coles Trading Company, a corporation, will pay all costs, which may be awarded against it on said appeal.

In Witness Whereof, the said Coles Trading Company, a corporation, as principal and Fidelity and Deposit Company of Maryland, a corporation, as surety, have caused these presents to be executed by their officers and agents thereunto duly authorized.

Dated this 31st day of July, 1950.

COLES TRADING
COMPANY,
A Corporation.

By /s/ J. J. COLLINS,
Its Secretary, Principal.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
A Corporation,

[Seal] By /s/ O. W. ROGERS,
Its Attorney in Fact,
Surety.

Receipt of copy acknowledged.

[Endorsed]: Filed July 31, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH PLAINTIFF-APPELLANT INTENDS TO RELY ON APPEAL

I.

Finding of Fact No. 6 is contrary to the clear weight of the evidence; moreover, it assumes ambiguity in the overlease and sublease, which assumption is contrary to the findings and conclusions as a whole and the judgment entered thereon.

II.

Conclusion of Law No. 2 is unsupported by any finding of fact or any substantial evidence, and is induced by an erroneous view of the law.

III.

The overlease and sublease should be construed as one instrument, so as to give effect to every material provision therein contained, and most strongly against defendant, which drafted the same; as so construed, the instruments are ambiguous.

IV.

By incorporating in the sublease certain specific covenants of the overlease to which it objected and by which it refused to be bound, defendant assumed and agreed to be bound by the remaining covenants of the overlease, to which it did not so object.

V.

By its conduct in assuming and performing for four years all of the covenants of the overlease which it did not specifically except in the sublease, defendant placed upon the instruments a construction which is now binding upon it, and which now estops it to deny that it assumed and agreed to be bound by the covenant of the overlease providing for the payment of excess taxes.

VI.

The sublease is in legal effect an assignment of the leasehold interest of the overlease, and obligates the sublessee to perform all of the covenants of the overlease, excepting only those which it specifically excepted or superseded in the sublease.

Dated July 31, 1950.

SHIMMEL, HILL & HILL and
BLAINE B. SHIMMEL,

By /s/ ROULAND W. HILL,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed July 31, 1950.

In the District Court of the United States for the District of Arizona

No. Civ. 1306-Phoenix

COLES TRADING COMPANY, a Corporation,
Plaintiff,

vs.

SPIEGEL, INC., a Corporation,
Defendant.

REPORTER'S TRANSCRIPT

The above-entitled and numbered cause came on duly and regularly for hearing before Hon. Dave W. Ling, Judge, presiding in the above-entitled court without a jury, commencing at the hour of 10:00 o'clock, a.m., on the 5th day of January, 1950, at Phoenix, Arizona.

The plaintiff was represented by Messrs. Shimmel & Rouland Hill, of Messrs. Shimmel, Hill & Hill, Phoenix, Arizona.

The defendant was represented by Mr. Ozell Trask, of Messrs. Jennings, Strouss, Salmon & Trask, Phoenix, Arizona.

The following proceedings were had:

The Clerk: Civil 1306, Phoenix, Coles Trading Company, a corporation, plaintiff, versus Spiegel, Inc., a corporation, defendant, for trial.

The Court: Are you ready, gentlemen?

Mr. Shimmel: The plaintiff is ready.

Mr. Trask: The defendant is ready.

The Court: Call your first witness.

Mr. Shimmel: The Court is sufficiently familiar with the subject matter?

The Court: Well, I was at one time. There was a motion filed.

Mr. Shimmel: Yes. I assume the Court is familiar with the pleadings. I will call Mr. Coles as a witness. I have four instruments that I request the Clerk to mark for identification.

(Thereupon the documents were marked as Plaintiff's Exhibits 1, 2, 3, and 4 for identification.)

FRANK E. COLES

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Shimmel:

Q. State your name. A. Frank E. Coles.

Q. Where do you reside? A. Phoenix.

Q. You are President of the Coles Trading [2*] Company, are you not, and were in '45 and previously? A. Yes.

Q. And is that the same corporation as the Dorris-Heyman Furniture Company, formerly that name? A. Yes.

Q. The change was effected by the change of name in '45, is that not correct? A. Yes.

Q. Are you, as President of this corporation, familiar with the overlease executed in April, '38,

*Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Frank E. Coles.)

from J. W. Dorris and wife to Dorris-Heyman Furniture Company? A. Yes.

Q. Who is the successor-owner of that property as lessor of that lease at the present time?

A. Well, the Dorris Estate, which is handled by the Valley National Bank as trustee.

Q. And that was the situation in '45, was it not?

A. Yes.

Q. Now, as President of the Dorris-Heyman Furniture Company, in July of 1945, did you have some negotiations with the defendant, Spiegel, Inc.?

A. Yes.

Q. And what was, in general, that transaction; just [3] state briefly what the transaction was?

Mr. Trask: If the Court please, we object to any oral testimony regarding the transaction, upon the ground that the results of the negotiations have been integrated in a written document.

The Court: He probably does not intend to give the details.

Mr. Shimmel: This is just briefly.

The Witness: You mean as to what we sold them?

Mr. Shimmel: Well, there was a sale of your stock of merchandise?

A. We sold them a stock of merchandise and the accounts and the going business and the lease.

Q. That is——

A. Which is all one transaction.

Q. That is the furniture business formerly oper-

(Testimony of Frank E. Coles.)

ated by Dorris-Heyman Furniture Company in Phoenix? A. Yes.

Q. Where were those negotiations had and the transaction consummated?

A. Chicago, at Spiegel's office in Chicago.

Q. The office of Spiegel was in Chicago, but what was said and done between you and the representatives of the defendant Spiegel respecting the overlease between Dorris and Dorris-Heyman [4] Furniture Company.

Mr. Trask: If the Court please, we want to object to the conversation regarding the transaction upon the ground that they have been integrated in written documents.

The Court: That is the general rule.

Mr. Shimmel: Yes. This is for the purpose, your Honor, of explaining the circumstances in which the overlease was executed, assuming that there was ambiguity in it as is raised by the pleadings, and for the purpose of explaining that ambiguity, it being our contention that there was an element of ambiguity within the instrument construed as a whole.

The Court: All right, go ahead.

Mr. Shimmel: Just state as briefly as you can what was said by you and Spiegel respecting the lease feature of the transaction.

Mr. Trask: If the Court please, may my objection go to this entire line of testimony without repeating the objection, so that I won't—I take it

(Testimony of Frank E. Coles.)

that the Court's ruling would be the same, and my objections would be the same throughout.

The Court: Yes.

The Witness: Well, this is in reference to the exceptions, is that it? [5]

Q. (By Mr. Shimmel): With reference to the lease, what was said by you with respect to the lease? A. Well, Spiegel——

Mr. Trask: May we have the time and place and circumstances, who was present, and a foundation laid, please?

Mr. Shimmel: Yes. Just state who was present, as you recall.

A. Well, Mr. Spiegel, the head—the President of the Company; there was Mr. Gatchard; I don't remember what his title was, he was one of the officials; Mr. Klein, I believe, the attorney was there, and my son Jim, myself, and I believe one of the brokers, one—yes, the broker was there.

Q. And do you remember approximately the date?

A. It seems to me it was August, '45, or July, '45.

Q. When was it with reference to the date borne by the sublease as signed, which is July 17th, 1945, if you recall?

A. It was about that time, July, 1945.

Q. Just state now what was said and done.

A. Well, we discussed—they agreed to accept the

(Testimony of Frank E. Coles.)

lease under the same obligations that we had, as the Dorris-Heyman Furniture Company had.

Mr. Trask: If the Court please, I am going [6] to object to this testimony because it is not relating to a conversation, just stating the conclusion of the witness as to what was done, and move that it be stricken.

The Court: All right.

Q. (By Mr. Shimmel): Just state as nearly as you can recall what was said and done?

A. Well, for example, they objected to the clause there regarding the structural—as Dorris-Heyman Company had agreed to take care of any structural defects, and Spiegel Company objected to that, so they set that forth in the lease.

Q. Was that matter discussed between you and Spiegel?

A. Yes, that was discussed and I said, "Well, all right, we will waive that particular item."

Q. Was a copy of the overlease before you in those negotiations? A. Yes.

Q. Had a copy of that overlease been delivered to Spiegel previously? A. Yes.

Q. And it was present in the negotiations in Chicago? A. Yes.

Q. Well, just state further what was said and done, [7] as you recall.

A. Oh, there was—then they wanted to protect themselves in case of a default, so we, I will say the corporation—default in the lease rent to the Dorris Estate. They had some kind of a provision put in

(Testimony of Frank E. Coles.)

there that they could step in and pay the rent so that they would not lose their rights under the lease. That was another clause put in. I don't remember them all without referring to the documents. I remember those two items very well.

Q. What was said by you or Spiegel with respect to the other provisions of the lease not excepted?

A. Well, they accepted everything except the exceptions they inserted in this agreement.

Mr. Trask: Again we object, if the Court please, upon the ground that it states a conclusion, this line of conversation, and I move that the testimony be stricken on that ground.

The Court: Well, it is a pretty general statement.

Mr. Shimmel: Well, did Spiegel object to any other provisions of the lease than those specifically excepted in the sublease? A. No. [8]

Q. And were the terms of the overlease thoroughly discussed at that time? A. Yes.

Q. And did you finally, at that time and place in Chicago, come to an agreement with Spiegel?

A. Yes.

Q. And were there certain documents drawn?

A. Yes.

Q. Who drew them?

A. The attorneys for the Spiegel Company.

Q. And were they presented to you there then in the final form? A. Yes.

Q. And referring specifically to the instrument

(Testimony of Frank E. Coles.)

called "Sub-lease," being Exhibit B to plaintiff's complaint in this case, that is the sublease that was executed, dated July 17th, 1945, was that prepared by Spiegel at that time? A. Yes.

Q. Was it presented to you? A. Yes.

Q. And did you sign it there at that time?

A. Yes.

Mr. Shimmel: I offer in evidence Plaintiff's Exhibit 1, being the original tax receipt for the year '48. [9]

Mr. Trask: No objection.

(Thereupon the document was received and marked as Plaintiff's Exhibit 1 in evidence.)

CITY OF PHOENIX, ARIZONA

REAL PROPERTY TAXES

FOR YEAR 1948 AS DESCRIBED BELOW

NOV--6-48 39811 • 10 28• BCk CRE— 3,139.92

PRINTED FIGURES ABOVE SHOW AMOUNT PAID ON THIS BILL

10-28 SUBDIVISION	LOT	BLK.	VALUATION LAND	VALUATION IMPROV.	VALUATION PERS.	TOTAL TAX	EXEMPT	PREVIOUSLY PAID	BALANCE TAX
Phoenix	4-5-6	20	189000	309400		6279.84			

TAX RATE $1.26

Valley National Bank Tr. C514

for J. W. Dorris Estate

RETURN WITH REMITTANCE—THIS WILL BE YOUR RECEIPT WHEN PAID TO COLLECTOR. CITY HALL

1st Installment Due Oct. 11, 1948 Del. Nov. 8, 1948

2nd Installment Due March 7, 1949 Del. April 11, 1949

1st Installment -- $ 3139.92

2nd Installment -- $ 3139.92

Cost & Penalty -- $

Total for collection $ 6279.84

CITY COLLECTOR 53

CITY OF PHOENIX, ARIZONA

REAL PROPERTY TAXES

FOR YEAR 1948 AS DESCRIBED BELOW

Plaintiff's Exhibit No. 1

APR--7-49 7152 • 10 28• ACk CRE— 3,139.92

PRINTED FIGURES ABOVE SHOW AMOUNT PAID ON THIS BILL

10-28 SUBDIVISION	LOT	BLK.	VALUATION LAND	VALUATION IMPROV.	VALUATION PERS.	TOTAL TAX	EXEMPT	PREVIOUSLY PAID	BALANCE TAX
Phoenix	4-5-6	20	189000	309400		6279.84		3139.32	3139.92

TAX RATE $1.26

Valley National Bank, Tr. for

J. W. Dorris Estate. C514

RETURN WITH REMITTANCE—THIS WILL BE YOUR RECEIPT WHEN PAID TO COLLECTOR. CITY HALL

1st Installment Due Oct. 11, 1948 Del. Nov. 8, 1948

2nd Installment Due March 7, 1949 Del. April 11, 1949

1st Installment -- $ Pd.

2nd Installment -- $ 3139.92

Cost & Penalty -- $

Total for collection $

CITY COLLECTOR 57

EXECUTOR U/W J. W. DORRIS, DEC.

VA[illegible] NATIONAL BANK OF PHOENIX

JAMES E. LINDSAY

COUNTY TREASURER AND EX-OFFICIO TAX COLLECTOR

MARICOPA COUNTY ARIZONA

EXECUTOR U/W J. W. DORRIS, DEC.

PHOENIX LOTS 4, 5 & 6, BLK 20

SD 1

C-514

COUNTY

1948 — **STATE AND COUNTY TAX RECEIPT** — IN PAYMENT OF FULL YEAR OR FIRST HALF OF TAXES LEVIED AGAINST PROPERTY AS INDICATED HEREON, OR BY ASSESSMENT ROLLS OF MARICOPA COUNTY — NO. 6870

VALUATION	LESS EXEMPTION	NET VALUATION OR ACREAGE	STATE AND COUNTY TAX	SCHOOL DISTRICT TAX	CITY, VOL F D OR SPECIAL DISTRICT TAX	TOTAL TAXES	FIRST HALF
234990 I 95335 R		330325	41290	61222203		~~1635109~~	8175 55
PAID BY Valley National Bank			EMMA MAHONEY		INTEREST PAID		
2ND INST WILL BE DUE MAR 7TH 1949 DELINQUENT MAY 2ND, 1949					TOTAL AMOUNT PAID		8175 55

JEWEL W. JORDAN

VALLEY NATIONAL BANK OF PHOENIX
EXECUTOR U/W J. W. DORRIS, DEC.

PHOENIX LOTS 4, 5 & 6, BLK 20

SD 1

C-514

MARICOPA COUNTY — STATE OF ARIZONA — JAMES [redacted] — COUNTY TREASURER AND EX-OFFICIO TAX COLLECTOR

1948 — **SECOND INSTALLMENT - STATE AND COUNTY TAX RECEIPT** — IN PAYMENT OF TAXES LEVIED AGAINST PROPERTY DESCRIBED HEREON, AS INDICATED BY ASSESSMENT ROLLS OF MARICOPA COUNTY. — NO. 6870

VALUATION	LESS EXEMPTION	NET VALUATION OR ACREAGE	STATE AND COUNTY TAX	SCHOOL DISTRICT TAX	CITY, VOL. F. D. OR SPECIAL DISTRICT TAX	TOTAL TAXES	SECOND HALF
234990 I 95335 R		330325	41290	61222203	MAY 1949 PAID JEWEL W. JORDAN	1635109	8175 54
PAID BY Valley National Bank			JAMES J. LINDSAY, TAX COLLECTOR BY AMELIA ROTH DEPUTY		INTEREST PAID		
					AMOUNT PAID		8175 54

Endorsed: Filed September 5, 1950.

55

PAUL P. O'BRIEN
CLERK

SEP 5 1950

FILED

IN THE SUPREME COURT OF THE STATE OF ARIZONA
IN AND FOR THE NINTH COURT

12673

JAN 5 - 1950

JAN 5 - 1950

(Testimony of Frank E. Coles.)

Q. (By Mr. Shimmel): Mr. Coles, I will show you an instrument marked Plaintiff's Exhibit 2 for identification, and ask you if you can identify that statement?

A. Yes, this is a statement we got from the Trust Department of the Valley National Bank billing us for our proportion of the excess taxes.

Q. Was that received by you on or about November, 1948, the date it bears? A. Yes.

Q. Mr. Coles, are you familiar with the allocation of the space in the premises as between Dorris-Heyman Furniture Company and Goldwaters' Mercantile Company: do you know what the percentage of the allocation is?

A. It was approximately 40 per cent for Goldwaters and 60 per cent for Dorris-Heyman Company.

Q. I note this statement refers to 59.2 to Coles Trading Company and 40.8 to Goldwaters', is that the precise allocation?

A. Well, that is probably figured on the number of square feet of the building. I just had it 60 and 40 in my mind. [10]

Mr. Shimmel: Thank you. I offer this in evidence.

Mr. Trask: No objection.

(Thereupon the document was received and marked as Plaintiff's Exhibit 2 in evidence.)

(Testimony of Frank E. Coles.)

PLAINTIFF'S EXHIBIT No. 2

Valley National Bank
Trust Department
Phoenix, Arizona

In account with
Coles Trading Company
88 North Country Club Drive
Phoenix, Arizona

Trust No. C-514

11-13-48	Proportionate share of real estate taxes in excess of $15,000.00, computed as follows:		
	1948 State and County taxes	$16,351.09	
	1948 City taxes	6,279.84	
	Total	$22,630.93	
	Less share to be borne by landlord	15,000.00	
	Balance to be borne by lessees	7,630.93	
	59.2% of excess over $15,000 to be paid by Coles Trading Co.		$4,517.51
	(40.8% to be paid by Goldwaters, Inc. $3,113.42)		

[Endorsed]: Filed September 5, 1950.

Q. (By Mr. Shimmel): Mr. Coles, did the Coles Trading Company thereafter pay to the Valley National Bank, as trustee, the amount of that statement? Showing you Plaintiff's 3 for identification, I will ask you if those are your checks with which you made payment?

A. Yes, these are the cancelled checks.

Mr. Shimmel: I offer them in evidence.

Mr. Trask: No objection.

(Thereupon the documents were received and marked as Plaintiff's Exhibit 3 in evidence.)

PLAINTIFF'S EXHIBIT NO. 3

ENDORSEMENT OF THIS CHECK BY PAYEE. ACKNOWLEDGES RECEIPT IN FULL FOR THE FOLLOWING ACCOUNTS

DESCRIPTION	AMOUNT
Re C vill - June 66 1/3	
Our a/c	

CHARGE

GROSS AMOUNT
DISCOUNT
AMOUNT PAYABLE

COLES TRADING CO.
88 N. COUNTRY CLUB DRIVE
PHOENIX, ARIZONA

NO. 1331

3 — 19 49

PAY TO THE ORDER OF Valley National Bank Trust Dept $ 226.00

Two hundred twenty six DOLLARS

COLES TRADING CO.

By L. E. Coles

58

HOME OFFICE
VALLEY NATIONAL BANK
CENTRAL AND MONROE
PHOENIX, ARIZONA

91-2
1221

91-2
1221

PRINTED IN ARIZONA

C514

VALLEY NATIONAL BANK
TRUST DEPARTMENT

91-2

VALLEY NATIONAL BANK
PHOENIX, ARIZONA

MAR 23 49

PRIOR ENDORSEMENTS GTD.

ENDORSEMENT OF THIS CHECK BY PAYEE, ACKNOWLEDGES RECEIPT IN FULL FOR THE FOLLOWING ACCOUNTS

DESCRIPTION	AMOUNT
Trust C514	
Income Tax	45 17 51
Jd	2240 —

CHARGE	
GROSS AMOUNT	
DISCOUNT	
AMOUNT PAYABLE	2257 51

COLES TRADING CO.
38 N. COUNTRY CLUB DRIVE
PHOENIX, ARIZONA

NO. 1347

9-14 19 49

PAY TO THE ORDER OF Valley Nat'l Bank Trust Dept $ 2257 51

Twenty-two hundred fifty-seven 51/100 DOLLARS

COLES TRADING CO.

By C. C. Coles

[Endorsed]: Filed September 5, 1950. 59

HOME OFFICE
VALLEY NATIONAL BANK
CENTRAL AND MONROE
PHOENIX, ARIZONA

91-2
1221

91-2
1221

PRINTED IN ARIZONA

C514

THE VALLEY NATIONAL BANK
TRUST DEPARTMENT

12673

SEP 8 1950

PAUL P. O'BRIEN
CLERK

VALLEY NATIONAL BANK
PHOENIX, ARIZONA

APR 15 49 5559

Case No. Cir-13961-PH
Exhibit No. 3
MARKED FOR IDENTIFICATION
JAN 5 - 1950
ADMITTED AND FILED
JAN 5 - 1950
Wm. M. Sharon
Deputy Clerk

(Testimony of Frank E. Coles.)

Q. (By Mr. Shimmel): Showing you Plaintiff's 4 for identification, I will ask you if you can identify that as a letter having been received by the Coles Trading Company?

A. Yes, this is taken from our files.

Q. Received on or about the date it bears, August, 1949? A. Yes, shortly thereafter.

Mr. Shimmel: I offer it in evidence.

Mr. Trask: No objection. [11]

(Thereupon the document was received as Plaintiff's Exhibit 4 in evidence.)

PLAINTIFF'S EXHIBIT No. 4

Spiegel
1061 W. 35th Street

August 3, 1949

Coles Trading Company
90 North Country Club Drive
Phoenix, Arizona

Attention: Mr. F. F. Coles

Re: D/B/A Dorris-Heyman Furniture Company, Adams and First St., Phoenix, Arizona

Dear Mr. Coles:

We have heretofore paid a portion of the excess of premium on eight point policy over premium on fire policy. We have heretofore paid a portion of the cost of boiler explosion insurance and have here-

(Testimony of Frank E. Coles.)

tofore paid Goldwater Mercantile Company one-half the cost of operating, repairing and maintaining the heating system of subject premises.

These obligations are all your obligations under the lease from J. W. Dorris and Sally G. Dorris to you, dated April 30, 1938. The obligations were not assumed by us under our lease from you dated July 17, 1945, and we hereby serve notice on you that such payments will not hereafter be made by us.

We will, of course, expect you to fulfill your obligations under your lease.

Very truly yours,

SPIEGEL, INC.

/s/ WILLIAM H. KLEIN,
Assistant Secretary.

WHK/jr

cc: Valley National Bank of Phoenix
Trustees under the Will of
J. W. Dorris, deceased, and Sally G.
Dorris, his wife,
Phoenix, Arizona

Registered Mail—Return Receipt Requested.

Admitted Jan. 5, 1950.

[Endorsed]: Filed September 5, 1950, U.S.C.A.

Q. (By Mr. Shimmel): Referring to the period of four years, from July, '45, to the date of this

(Testimony of Frank E. Coles.)

letter, August, '49, Mr. Coles, during that time, who, if you know, paid the excess of premium on the eight-point policy over-premium on fire policy on the premises described in this lease?

A. Well, we didn't pay it.

Q. During that same period who, if you know, paid the boiler insurance premiums?

Mr. Trask: If the Court please, I am going to renew my objection on testimony regarding payments subsequent to the lease as, first, having no probative value; second, on the ground if they can have any probative value it would be an attempt to alter or vary the terms of written documents which the parties heretofore entered into.

The Court: Go ahead.

The Witness: What was that question?

(The question was read by the reporter.)

A. Well, we didn't pay it.

Q. (By Mr. Shimmel): During that same period who paid to Goldwater's Mercantile Company one-half of the cost of operating the heating plant as provided by the overlease? [12]

A. We didn't.

Q. Who, during that period, took care of the removal of rubbish from the store premises?

Mr. Trask: Again, if the Court please, that is—I can say that it has no probative value on the matter in controversy, and I object to it on that ground.

Mr. Shimmel: Your Honor hasn't seen this letter, of course.

(Testimony of Frank E. Coles.)

The Court: No.

Mr. Shimmel: The letter that was offered as an admission by Spiegels four years after the transaction of a specific construction of the lease instrument expressly consistent with our construction. In other words, it is an admission that for four years they did voluntarily without objection, pay the items provided by the over-lease not excepted in the sub-lease. In other words, it was an admission by them and an assumption of the over-lease in four other respects exactly comparable to the tax element here involved, and it is called as an admission against interest, and obviously material as construction by the parties of the terms of the lease if it be considered ambiguous.

Mr. Trask: It, also, if the Court please, the [13] letter also—the purport of the letter was to inform the plaintiff that there was no legal obligation under the terms of the lease to make that payment, and they disclaimed the obligation and notified them they would not make any further payments.

Mr. Shimmel: Yes, there is that element, and we are offering it for the probative value on the construction of the lease for a period of four years.

Mr. Trask: My objection was to the question as to who took the rubbish out of the building, and that has nothing to do with the letter or anything else, as far as I know.

The Court: Well, I don't know.

Mr. Shimmel: Well, it is a specific provision of the over-lease, your Honor, which required the

(Testimony of Frank E. Coles.)

lessee to do that, and I just wanted to show that for a period of four years that is another obligation which had been assumed by the defendant.

The Court: All right, go ahead.

Mr. Shimmel: You may cross-examine.

Cross-Examination

By Mr. Trask:

Q. Mr. Coles, in connection with the execution of [14] the documents in the sale of your store, the Dorris-Heyman Store, to Spiegel Brothers, and the preparation and the signing of those documents, were you represented by counsel?

A. No, not there.

Q. I beg your pardon? A. Not there.

Q. Not at Spiegel's, but before those documents were delivered and the transaction consummated, did you have the advice of counsel; weren't you represented by your attorney, Mr. Shimmel, here?

A. Well, the whole thing was signed up in Chicago, and worked up by them, as I remember it.

Q. May I refresh your memory. Isn't it a fact that Mr. Shimmel acknowledged your signature personally on the sub-lease?

A. Well, that had to be done because we had to get the secretary's signature here, and the sub-lease was brought back here to be signed by the secretary and acknowledged here.

Q. That is right, but isn't it a fact, therefore, that the only signing that was done in Chicago, you signed, and then the documents were brought

(Testimony of Frank E. Coles.)

back here and your acknowledgment was taken by your attorney, Mr. Shimmel, and the Secretary of the corporation signed here, and the documents [15] were later delivered and the transaction completed here in Mr. Gust's office here in Phoenix, do you remember that?

A. I don't remember that, it is four or five years ago; I don't remember it.

Q. Isn't it a fact, Mr. Coles, that before this transacton, before it was completed, you were advised by Mr. Shimmel, who was your attorney, before it was completed and the store turned over?

A. I am very hazy on that. I really can't answer truthfully one way or the other.

Q. Well, Mr.——

A. Well, I could make a statement but I better not.

Q. Mr. Coles, you don't mean to tell the Court, do you, that in a transaction involving something upwards of a half million dollars you had no advice of counsel at all in the matter?

A. May I express what I have in mind on that?

Q. I would like for you to answer the question first, and your counsel can undoubtedly make——

A. I mean I can throw light on the way my mind is working since trying to remember this.

Q. (By Mr. Trask:) Is the original lease present, the sub-lease?

Mr. Shimmel: Well, it is attached to the [16] pleadings; it is admitted, and shows on its face that

(Testimony of Frank E. Coles.)

it was acknowledged in Phoenix, Arizona, by me several days later.

The Witness: There were no changes made by anyone.

Q. (By Mr. Trask): When was it you were in Chicago, Mr. Coles?

A. At the time we signed those documents.

Q. What date was that, approximately?

A. Well, it is the date you have on there. We were there probably a couple of days before.

Q. The sub-lease is dated July 17th. Then, would you say it is July 17th or prior to that time?

A. Somewhere about that time. I can't remember now the correct date.

Q. And you do not deny it, do you, Mr. Coles, that the document was not completed until it was brought back to Phoenix and signed by the other representatives of your organization and acknowledged by Mr. Shimmel?

A. It was signed by our Secretary here.

Q. Mr. Collins? A. Mr. Collins.

Q. And your signature was acknowledged and notarized by Mr. Shimmel here in Phoenix? [17]

A. Well, the document will speak for itself.

Q. And you did consult with Mr. Shimmel during the course of these negotiations and prior to the time the transaction was completed, did you not, Mr. Coles?

A. I think I did, it would sound reasonable that I did. It seems to me I talked to him on the long distance phone about something.

(Testimony of Frank E. Coles.)

Q. But you talked to him after you came back to Phoenix, did you not? A. Yes, I did.

Q. You were, of course, present with Mr. Shimmel, were you, when your signature was acknowledged, were you not? A. Yes.

Q. Mr. Shimmel consulted with you regarding the transaction at that time, did he not?

A. Well, the transaction was consummated then.

Q. Mr. Coles, isn't it a fact that the transaction had not been consummated until the papers were exchanged here in Mr. Gust's office?

A. Well, I don't know that. I am not legally competent to say whether it was or not.

Q. That is correct, I don't want to take advantage of you, Mr. Coles.

A. The papers were all signed in Chicago, and of [18] course, they had to come back and get the Secretary's signature, but it was all completed there and Mr. Shimmel had nothing to do with what happened to be drawn up and signed there, as I remember it. I may have talked to him over the phone about something.

Q. Isn't it a fact, Mr. Coles, that there were considerable additional documents that were necessary to be obtained, and wasn't it necessary, for instance, for your corporation to authorize you by the minutes of the Board of Directors to complete this transaction, isn't that a fact?

A. Well, they had Mr. Shimmel draw that up.

Q. That was done here in Phoenix, was it not?

A. Yes.

(Testimony of Frank E. Coles.)

Q. That was necessary before the transaction was completed, was it not, Mr. Coles?

A. I suppose that authority was granted before the papers were signed. I don't remember.

Q. Mr. Coles, isn't it also true that subsequent to the execution of the sub-lease in connection with any changes or dealings on the property with Spiegel, the corporation consulted with you regarding those changes, alterations, and changes in the property down there at the Dorris-Heyman Furniture Company? [19]

A. I remember one time getting a letter from them, they were going to spend a lot of money there.

Q. And at that time they took the matter up with you?

A. We told them it would involve structural changes and we would want to go into it more farther, and I never heard nothing more from them.

Q. And they took the matter up with you, did they not?

A. Yes, but they never made the alterations.

Q. But the question as to whether or not they could or should was taken up with you on behalf of the Coles Trading Company, was it not, Mr. Coles?

A. Yes, that is, in reference to the structural changes.

Mr. Trask: That is correct. I believe that is all.

Mr. Shimmel: That is all.

(The witness was excused.)

Mr. Shimmel: The plaintiff rests. [20]

DEFENDANT'S CASE

Mr. Trask: Mr. Klein.

WILLIAM H. KLEIN

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Trask:

Q. Would you state your name, please?

A. William H. Klein.

Q. Where do you live?

A. Chicago, Illinois.

Q. What is your occupation, Mr. Klein, your official position with the Company?

A. I am Assistant Secretary of Spiegel, Inc.

Q. Mr. Klein, you have heard Mr. Coles testify with respect to the completion of the transaction involved in this case? A. Yes.

Q. Were there any other—Well, let me ask you this: Were you present at the time Mr. Coles was present in Chicago and the papers were prepared in this transaction, the final papers?

A. I thought I was present at all meetings [21] that Mr. Coles was present in Chicago.

Q. In connection with the completion of the transaction, Mr. Klein, were there any other docu-

(Testimony of William H. Klein.)

ments executed other than the lease or sub-lease that was attached to the pleadings in this case?

A. Yes.

Q. What were those, Mr. Klein?

A. Why, they were minutes of the meeting of the sub-lessor corporation; there was the consent—request for and the consent of the underlying lessor, and I believe there was some other document or documents which were required before the instruments were transmitted to us, executed; the exercise of option by the sub-lessor, option to renew the lease.

Mr. Trask: Mark these.

(Thereupon the documents were marked as Defendant's Exhibits A, B, C, D, and E for identification.)

Q. (By Mr. Trask): I will hand you Defendant's Exhibit A for identification, and ask you to state what that document is.

A. This is a letter from the Coles Trading Company, then the Dorris-Heyman Furniture Company, sending a copy of our sub-lease to the Valley [22] National Bank, the underlying lessor.

Mr. Trask: I offer it in evidence.

Mr. Shimmel: I object to it as immaterial.

Mr. Trask: We offer it upon the ground that it shows that it was a request by the Bank, by the Dorris-Heyman Furniture Company to execute and give their consent to the execution of a sub-lease. It is offered for the purpose of showing that the

(Testimony of William H. Klein.)

document which was executed was, in fact, a sub-lease which, I understand, is not the position of counsel.

Mr. Shimmel: It appears that everybody calls it a sub-lease, it is called that in the instrument itself; no doubt about it, we all call it a sub-lease. It just clutters up the record with a lot of instruments.

Mr. Trask: Well, counsel has taken——

The Court: He claims that it was an assignment.

Mr. Trask: That is right, he claims it is an assignment, and it is introduced in evidence in an attempt to impeach——

The Court: All right, all right, it may be admitted.

(Thereupon the document was received and marked as Defendant's Exhibit A in evidence.)

DEFENDANT'S EXHIBIT A

Phoenix, Arizona
July 23, 1945

The Valley National Bank, Phoenix
Trustee Under the Will of J. W. Dorris, Deceased, Phoenix, Arizona

In re: Your Trust No. C-514

Gentlemen:

This company is Lessee of the premises at the Southeast Corner of Adams and First Streets, Phoenix, Arizona, under the lease executed April 30, 1938, by your Trustor, J. W. Dorris, and Sallie G.

(Testimony of William H. Klein.)

Dorris, his wife. We enclose a copy of a Sub-lease, which we, as Lessor, executed and delivered to Spiegel, Inc., a Delaware corporation, on July 17, 1945, and hereby request you, as Trustee under the Will of said J. W. Dorris, Deceased, to execute and deliver to us an appropriate instrument, evidencing your consent to this Sub-lease. We understand that you have already satisfied yourselves respecting the qualifications of Spiegel, Inc., as a tenant of the premises.

Yours very truly,

DORRIS-HEYMAN
FURNITURE COMPANY,

By /s/ F. E. COLES,
President.

Original of the above letter received this 26th day of July, 1945.

The Valley National Bank of Phoenix, Trustee under the Will of J. W. Dorris, Deceased.

By /s/ VICTOR H. PULIS,
Trust Officer.

[Endorsed]: Filed September 5, 1950.

Q. (By Mr. Trask): I show you Defendant's Exhibit B [23] in evidence and ask you to state what those documents are.

A. Why, they constitute a letter from counsel

(Testimony of William H. Klein.)

in Phoenix addressed to me in Chicago, enclosing a letter from the Valley National Bank to the Dorris-Heyman Furniture Company, to the effect that the Valley National would consent to our sub-lease so long as it was a sub-lease and not an assignment.

Mr. Trask: I offer it in evidence.

Mr. Shimmel: I object to the language of the witness construing the instrument, there being no such language in it.

Mr. Trask: Well, the latter part of it, as far as I am concerned, I would be willing to strike the latter part of it.

Mr. Shimmel: I will object to it as being entirely immaterial.

The Court: All right, it may be received.

(Thereupon the document was received and marked as Defendant's Exhibit B in evidence.)

(Testimony of William H. Klein.)

DEFENDANT'S EXHIBIT B

Gust, Rosenfeld, Divelbess & Robinette
(Kibbey, Bennett, Gust, Smith & Rosenfeld)
Professional Building
Phoenix, Arizona

September 4th, 1945

Our File #5215/L
Mr. William H. Klein,
Legal Department—Spiegel, Inc.,
1061 West 35th Street,
Chicago (9), Illinois.

Dear Mr. Klein:

In answer to your letter of August 30th, 1945, we enclose herewith copy of the consent of The Valley National Bank of Phoenix, as Trustee under the last Will and Testament of J. W. Dorris, deceased, to the sub-lease to Spiegel, Inc.

The original of this consent was mailed to the Dorris-Heyman Furniture Company here on July 26th. The enclosed copy, however, bears the original signature of Victor H. Pulis, as Trustee Officer of The Valley National Bank. To our knowledge, the application for said consent was considered by the Trust Committee and regularly approved.

Very truly yours,

GUST, ROSENFELD,
DIVELBESS & ROBINETTE,

By /s/ J. L. GUST.

g/b
Enc.

(Testimony of William H. Klein.)

Valley National Bank
Phoenix, Arizona

July 26, 1945

(Copy)
Dorris-Heyman Furniture Company
Adams and First Street
Phoenix, Arizona

Attention: Mr. F. E. Coles, President.

Gentlemen:

We are in receipt of your request that we grant permission, in writing, to you to sublet to Spiegel, Inc., a corporation, all of the premises covered by the lease dated the 30th day of April, 1938, by and between J. W. Dorris and Sallie G. Dorris, his wife, and Dorris-Heyman Furniture Company, a corporation, as lessee, of which lease we are now in charge as trustee under the will of J. W. Dorris, deceased.

We are satisfied that Spiegel, Inc., the proposed lessee, is satisfactory as a tenant of said premises and hereby grant you the privilege of subletting said premises to said Spiegel, Inc., a corporation, as sub-tenant.

Your proposed lease with said sub-tenant, however, contains certain provisions which the lease declares shall prevail over anything to the contrary in the over-lease. It is our understanding that those provisions in the sub-lease are agreements between you and your sub-tenant and that the original lessor is not concerned with them in any way, and this

(Testimony of William H. Klein.)

consent is expressly given with the understanding that the provisions of the lease as executed on the 30th day of April, 1938, between J. W. Dorris and Sallie G. Dorris, his wife, and Dorris-Heyman Furniture Company, a corporation, remain binding upon Dorris-Heyman Furniture Company and that we will look to Dorris-Heyman Furniture Company to carry out the provisions of said lease, anything to the contrary in the sub-lease notwithstanding, and that the rights of the sub-tenant as far as we are concerned will be measured by said lease and it must look to you for the fulfillment of any provisions to the contrary in the sub-lease.

The proposed sub-lease contains provisions contemplating subletting to departments of the sub-tenant. We will be glad to consider any requests for such subletting when they are presented under the last sentence of the first paragraph on page four of the original lease.

We trust that you will find the terms of this consent in accordance with your understanding of the effect of the proposed sub-lease.

Yours very truly,

THE VALLEY NATIONAL BANK OF PHOENIX, Trustee Under the Will of J. W. Dorris, Deceased,

By /s/ VICTOR H. PULIS,
Trust Officer.

VHP:L

Admitted and filed January 5, 1950.

(Testimony of William H. Klein.)

Mr. Trask: At this time, if the Court please, I have photostatic copies of Defendant's Exhibits A and B in evidence that I would like to substitute for the originals.

Mr. Shimmel: No objection. [24]

Mr. Trask: And may the originals be withdrawn upon substitution of a copy?

The Court: Yes.

Q. (By Mr. Trask): Mr. Klein, I show you Defendant's Exhibit C for identification, and ask you to state what that document is.

A. This is a certified copy of the minutes of the special meeting of the Board of Directors of the Dorris-Heyman Furniture Company, July 10th, 1945, with reference to the sale of the premises—the sale of the property, etcetera.

Mr. Trask: I offer that in evidence.

Mr. Shimmel: No objection.

(The document was received and marked Defendant's Exhibit C in evidence.)

DEFENDANT'S EXHIBIT C

Minutes of Special Meeting of Board of Directors of Dorris-Heyman Furniture Company, Held July 10, 1945, at 4:00 p.m., in the Office of the Company, 101 West Adams Street, Phoenix, Arizona

The following Directors were present:

F. E. Coles

John J. Collins

(Testimony of William H. Klein.)

Absent:

Loretto J. Coles

On motion duly made, seconded and carried, the directors present waived notice and consented to the holding of this special meeting.

The meeting was presided over by F. E. Coles, and John J. Collins acted as Secretary. Mr. Coles then announced that they had a proposition from Spiegel, Inc., of Chicago, to purchase most of the physical assets of this company, including its inventory of merchandise at Phoenix and Tucson, its merchandise in transit, its leasehold improvements, fixtures, equipment and motor vehicles (per schedule), accounts receivable, and to sub-lease its Phoenix and Tucson stores, and lease its warehouse on East Madison Street, Phoenix; he also stated that it would be necessary to go to Chicago to consummate this sale and lease arrangements. Therefore, on motion duly made and unanimously carried, Mr. F. E. Coles was authorized by the Directors present to go to Chicago to consummate the transaction mentioned in these minutes, and to execute all necessary instruments to complete the transaction.

There being no further business to come before the meeting, on motion duly made, seconded and carried, the meeting adjourned.

Dated at Phoenix, Arizona, July 10, 1945.

/s/ JOHN J. COLLINS,
Secretary.

(Testimony of William H. Klein.)

I, John J. Collins, Secretary of Dorris-Heyman Furniture Company, an Arizona corporation, hereby certify that, at a duly called and convened meeting of the Board of Directors of said corporation, held at Phoenix, Arizona, on the 10th day of July, 1945, at which a quorum was present and voting, I recorded the foregoing minutes; and that the foregoing is a full, true and correct copy of said minutes.

Dated at Phoenix, Arizona, this 10th day of July, 1945.

/s/ JOHN J. COLLINS,
Secretary.

Admitted and filed January 5, 1950.

Q. (By Mr. Trask): I show you Defendant's Exhibit D for identification, Mr. Klein, and ask you to state what that document is.

A. This is a photostatic copy of an exercised option by Dorris-Heyman Furniture Company, exercising the option to renew the lease which was delivered to Spiegel, Inc., at the time of the closing of the original transaction.

Mr. Trask: I offer it in evidence.

Mr. Shimmel: The same objection, immaterial.

The Court: It may be received. [25]

(Thereupon the document was marked as Defendant's Exhibit D in evidence.)

(Testimony of William H. Klein.)

DEFENDANT'S EXHIBIT D

State of Arizona,
County of Maricopa—ss.

The lease for premises at Adams and First Street, Phoenix, Arizona, which Dorris-Heyman Furniture Company holds and under which it is in possession of said property, expires on September 30, 1949.

Under the provisions of said lease, Dorris-Heyman Furniture Company has the privilege of renewing said lease at a rental of Twenty-one Hundred and Fifty Dollars ($2150.00) per month for an additional term of ten (10) years upon the same terms and conditions as in said lease contained, and Dorris-Heyman Furniture Company, therefore, hereby gives notice that it demands a renewal of the lease dated April 30, 1938, in which J. W. Dorris and Sallie G. Dorris, his wife, of Phoenix, Arizona, are named as Lessors for the store located at Adams and First Street, Phoenix, Arizona, for the term of ten (10) years from and after the 30th day of September, 1949, according to the provisions in the said lease.

DORRIS-HEYMAN
FURNITURE CO.,

F. E. COLES,
President.

Attest:

/s/ J. J. COLLINS,
Secretary.

(Testimony of William H. Klein.)

Notice To:

The Valley National Bank of Phoenix, Trustees under the Will of J. W. Dorris, Deceased, and Sallie G. Dorris, his wife, of Phoenix, Arizona.

Admitted and filed January 5, 1950.

Q. (By Mr. Trask:) You heard Mr. Coles testify on direct examination with respect to some specific amendments and modifications of the original agreement and sub-lease. I show you Defendant's Exhibit E for identification, and ask you to state whether or not those are the documents about which Mr. Coles testified?

A. Yes, I believe they are.

Q. Those are photostatic copies of the original documents?

A. Original documents, yes, sir.

Mr. Trask: We offer it.

Mr. Shimmel: The same objection, immaterial.

The Court: It may be received.

(Thereupon, the document was received as Defendant's Exhibit E in evidence.)

DEFENDANT'S EXHIBIT E

Agreement made this 10th day of December, 1945, by and between Coles Trading Company, formerly "Dorris-Heyman Furniture Company," a corporation organized and existing under the laws of Arizona, (hereinafter sometimes called "Dorris"), and Spiegel, Inc., a corporation organized

(Testimony of William H. Klein.)

and existing under the laws of Delaware, (hereinafter sometimes called "Spiegel"):

Witnesseth

Whereas, the parties hereto did on the seventeenth day of July, 1945, enter into an agreement whereby, Dorris demised and sublet to Spiegel the following described premises, situated in the County of Maricopa, State of Arizona, to wit:

> The North Half (N½), and the East twenty-three (23) feet of the South Half (S½) of the basement, including the area under the West and North sidewalks adjacent to the said North Half (N½); the North Half (N½) of the first and second floors; and all of the third and fourth floors; of that certain building at the southeast corner of First and Adams Streets, located on Lots Four (4), Five (5) and Six (6), Block Twenty (20), in the City of Phoenix; it being understood that the East twenty-three (23) feet of the South Half (S½) of said basement is subject to the terms of an agreement of even date between Lessee and Goldwaters Mercantile Company, Lessee of the balance of said building.

commonly known as the southeast corner of East Adams and First Streets, Phoenix, Arizona, and

Whereas, Dorris is the lessee under a certain lease dated April 30, 1938, of which "Dorris-Heyman Furniture Company" is the lessee and the Valley National Bank of Phoenix, Arizona, as

(Testimony of William H. Klein.)

Trustee under the will of J. W. Dorris deceased, (hereinafter sometimes referred to as "Valley"), is the lessor, and

Whereas, Spiegel has obtained the consent of Valley, to the curing of any default of Dorris by Spiegel, and

Whereas, the parties hereto believe it would be to their mutual advantage to amend said agreement in the following particulars;

Now, Therefore, in consideration of the mutual covenants and agreements herein contained, it is agreed as follows:

> In the event Dorris shall be in default under its lease from Valley and in the event Valley shall so notify Spiegel, Dorris agrees that Spiegel may cure such default and in the event Spiegel does cure such default the full amount of the cost and expense entailed shall immediately be owing by Dorris to Spiegel and Spiegel shall have the right to deduct the cost thereof, from any rental due or accrued or to become due or accrue to Dorris from Spiegel.

In Witness Whereof, the parties hereto have caused these presents to be executed in their corporate names and by the officers hereunto duly authorized, and the corporate seals to be hereunto affixed, the day and year first above written.

[Seal] COLES TRADING COMPANY,

By /s/ J. E. COLES,
President.

(Testimony of William H. Klein.)

Attest:

/s/ J. J. COLLINS,
Secretary.
SPIEGEL, INC.

[Seal] By /s/ M. J. S.

Attest:

/s/ W. A.

This Agreement, made this 10th day of December, 1945, by and between Spiegel, Inc., a corporation of the State of Delaware, (hereinafter sometimes referred to as "Spiegel"), and Valley National Bank of Phoenix, Arizona, as Trustee under the will of J. W. Dorris, deceased, (hereinafter sometimes referred to as "Valley"):

Witnesseth

Whereas, under date of April 30, 1938, J. W. Dorris and Sally G. Dorris entered into a lease with Dorris-Heyman Furniture Company, (hereinafter sometimes referred to as "Dorris"), demising the following described premises situated in the County of Maricopa, State of Arizona, to wit:

> The North Half (N½), and the East twenty-three (23) feet of the South Half (S½) of the basement, including the area under the West and North sidewalks adjacent to the said North Half (N½); the North Half (N½) of the first and second floors; and all of the third and

(Testimony of William H. Klein.)

fourth floors; of that certain building at the southeast corner of First and Adams Streets, located on Lots Four (4), Five (5) and Six (6), Block Twenty (20), in the City of Phoenix; it being understood that the East twenty-three (23) feet of the South Half (S½) of said basement is subject to the terms of an agreement of even date between Lessee and Goldwaters Mercantile Company, Lessee of the balance of said building,

commonly known as the Southeast corner of East Adams and First Streets, and

Whereas, Spiegel, Inc., is the sublessee of Dorris under said lease, and

Whereas, said lease provided for a monthly rental of One Thousand Eight Hundred Fifty ($1,850.00) Dollars per month, payable on the fifth day of each and every month during the term, and

Whereas, it would be to the advantage of Valley to have Spiegel cure any default by Dorris, and

Whereas, it would be to the advantage of Spiegel to be able to cure any default by Dorris.

Now, Therefore, in consideration of the mutual covenants and agreements herein contained, it is agreed as follows:

1. In the event Dorris shall at any time be in default, under the above-mentioned lease, Valley shall notify Spiegel thereof and Spiegel

(Testimony of William H. Klein.)

shall be granted ten days after such notice in which to cure said default.

2. In the event Spiegel cures such default in accordance with Paragraph One hereof then, said lease shall continue in full force and effect and shall be treated for all purposes as though no default had occurred.

3. All notices, demands and reports required under the terms of this lease must be given by registered mail, with postage prepaid, addressed to Valley, to Valley National Bank, Phoenix, Arizona, and addressed to Spiegel, to Spiegel, Inc., 1061 West 35th Street, Chicago 9, Illinois, Attention: Secretary, with a carbon copy thereof addressed to such other parties and such other addresses as the parties hereto may from time to time designate.

In Witness Whereof, the parties hereto have caused these presents to be executed, Valley in its capacity as Trustee, and Spiegel in its corporate name and by its officers and thereunto duly authorized, and its corporate seal to be hereunto affixed the day and year first above written.

VALLEY NATIONAL BANK,

[Seal] By /s/ [Indistinguishable.]
Vice President.

(Testimony of William H. Klein.)

Attest:

/s/ A. K. WILDMAN,
Assistant Cashier.

SPIEGEL, INC.

[Seal] By /s/ M. J. S.

Attest:

/s/ W. A.

Admitted and Filed January 5, 1950.

Q. (By Mr. Trask): Now, in connection with the amendments of December 10th, which are Defendant's Exhibit E in evidence, in the course of the negotiation of the form of these documents, did you correspond with anyone regarding that fact?

A. Either I or the Company did correspond.

Q. Who did you correspond with regarding the form? [26]

A. Correspondence was had with Mr. Shimmel, I believe.

Q. And in that connection, is the form in which the documents exist now the form in which they were originally drafted? A. No, sir.

Q. As originally drafted, what did you request in the event Dorris-Heyman should default in their obligation?

A. We requested not only the right to cure the default, but also the right to take an assignment of Dorris-Heyman's interests to ourselves.

(Testimony of William H. Klein.)

Q. Was there any objection made by Mr. Shimmel to that? A. He objected strenuously.

Mr. Shimmel: I object to that, your Honor, it is entirely immaterial, a transaction six months afterwards, I don't know what possible bearing it would have on this lease.

Mr. Trask: It is an amendment—it says on its face it is an amendment to the original transaction and a part of it.

The Court: All right.

Mr. Trask: Would you mark that for identification?

(Thereupon, the document was marked as Defendant's [27] Exhibit F for identification.)

Q. (By Mr. Trask): And in connection with the negotiation of the form of that document, I show you Defendant's Exhibit F for identification, and ask you to state what that is.

A. This is a copy of a letter from Mr. Shimmel to John J. Collins, our then store manager of our operation here in Phoenix.

Q. Have you searched for the original of that document? A. I have.

Q. Is that, then, a typewritten copy, to your knowledge the exact copy of the original?

A. Yes.

Mr. Shimmel: Well, we object to it. It is just a fragmentary part of the correspondence, meaning nothing by itself, not binding upon the plaintiff in any way.

(Testimony of William H. Klein.)

The Court: All right, it may be received.

(Thereupon, the document was received as Defendant's Exhibit F in evidence.)

DEFENDANT'S EXHIBIT F

Copy

Law Office
Blaine B. Shimmel
Title & Trust Bldg.
Phoenix, Ariz.

October 17, 1945

Mr. John J. Collins,
c/o Spiegel, Inc.
(Dorris-Heyman Furniture Co.),
P. O. Box 2380,
Phoenix, Arizona

Dear Mr. Collins:

Yesterday, I received from you three copies each of two agreements, apparently drafted by Spiegel, Inc., and executed by that corporation. The first instrument comprises an agreement between Spiegel, Inc., and The Valley National Bank, as Trustee, providing, generally, that Spiegel may cure any default of Lessee Coles Trading Company under the original Dorris lease. The second agreement, between Coles Trading Company and Spiegel, provides that, in the event Spiegel cures any such default, it shall be reimbursed in the full amount of its costs and expenses, which amount it shall have the right to deduct from any rental due under its

(Testimony of William H. Klein.)

sublease and, further, that in the event of such default and curing, Coles Trading Company agrees to assign the lease to Spiegel.

I can readily appreciate why Spiegel desires an express statement of its right to cure any default which may be incurred by its Lessor, Coles Trading Company. If The Valley National Bank is willing to execute the first instrument, I see no objection to it on the part of Coles Trading Company. But with reference to the agreement between Coles Trading Company and Spiegel, I see no basis for the former to agree to assign the lease to Spiegel. Such an assignment would have the effect of eliminating the sublease, and this, of course, was never contemplated. I will want to discuss the matter with Mr. F. E. Coles on his return, but do not presently see any objection to Coles Trading Company agreeing to reimburse Spiegel for any amounts expended in curing a default of Coles Trading Company. It seems to me that this right of reimbursement would exist in any event. But if I correctly understand the import of the two instruments, construed together, the provision requiring Coles Trading Company to assign the lease to Spiegel is objectionable. It may be that you have further information as to the purpose of this provision, and what Spiegel has in mind in proposing it. If so, I will be glad to discuss the matter with you.

Since The Valley National Bank is a party to one of these agreements, I am taking the liberty

(Testimony of William H. Klein.)

of forwarding one copy of each agreement to Mr. J. L. Gust. The other two copies of each instrument are herewith returned.

Yours very truly,

/s/ BLAINE B. SHIMMEL.

BBS:AC

Encl.—2

cc—Mr. J. L. Gust,
Attorney at Law,
Professional Building,
Phoenix, Arizona.

cc—Coles Trading Company,
817 Security Building,
Phoenix, Arizona.

Admitted and Filed January 5, 1950.

Q. (By Mr. Trask): Mr. Klein, with respect to the evidence regarding some payments that had heretofore been made during the term of the lease, would you state to the Court how it happened that those payments were made? [28]

A. Those payments were made either through the store or through our accounting division without in any way checking with the Legal Department. Most payments are made that way unless they amount to a substantial amount, or the accounting department would question them.

(Testimony of William H. Klein.)

Q. Was there any payment made of the taxes which are the subject of litigation here by Spiegel?

A. Not to the best of my knowledge.

Q. At the time when payments were made by the local store, did the local store have a copy of the lease, to your knowledge?

A. They did not.

Q. Or the sub-lease, I mean?

A. No, sir.

Mr. Trask: I believe that is all.

Cross-Examination

By Mr. Shimmel:

Q. Mr. Klein, are you an attorney?

A. I am.

Q. And you were familiar with all of the provisions of this instrument designated "sub-lease" as executed in Chicago? A. Correct.

Q. And you knew that there were a number of provisions [29] in the over-lease which were being performed for four years by Spiegel, Inc., did you not?

A. I knew there were many such provisions, yes.

Q. Beg pardon?

A. I know there were many provisions, yes.

Q. And until your letter of August 3, 1949, you never made any objection to them?

A. To those of which I knew.

Q. You knew that the over-lease provided for

(Testimony of William H. Klein.)

the payment by the lessee of certain insurance premiums, did you not? A. Yes.

Q. And you knew that Spiegel was making those payments? A. I did not.

Q. You did not? A. I did not.

Q. Never came to your attention?

A. No, sir.

Q. Did you ever check the lease to see who was performing the provisions of the over-lease?

A. No, sir.

Q. Never gave it any thought?

A. No, sir.

Q. Anyone, as far as Spiegel is concerned, [30] give it any thought?

A. That, I can't answer.

Q. You knew that they were operating a heating plant in connection with Goldwater's, did you not?

A. I did not. I was not following the performance of the terms of the lease.

Q. Well, you had a local manager in charge?

A. Yes.

Q. And he was in charge of the heating facilities of your store?

A. If I can help just a little bit as attorney. We have some 300 leases I do not follow until a question is raised.

Q. And you personally did not know to any extent Spiegel was performing the lease?

A. That is right.

(Testimony of William H. Klein.)

Q. When you wrote this letter of August 3rd, '49, that is in evidence here, you had made an investigation? A. That is correct.

Q. And you discovered that for four years your Company had been performing substantially all of the terms of the over-lease which were not excepted in the sub-lease?

A. I checked for the points which were costing the Company money and discovered they were being [31] performed by the Company.

Q. Those are the ones?

A. The four items.

Q. You discovered for four years that your Company had been paying the insurance items and for four years had been contributing with Goldwater's to the heating of the building?

A. Yes.

Q. Now, you specifically recall the occasion when Mr. Coles was in Chicago in July, '45?

A. I do.

Q. You had before you at that time, as attorney for Spiegel, a copy of the over-lease, did you not?

A. I did.

Q. And there were some specific items in it to which you objected, were there not?

A. Correct.

Q. And you told Mr. Coles that you would not assume the obligation to make structural repairs to the building, did you not, either you or Mr. Spiegel, in your presence?

(Testimony of William H. Klein.)

A. I said that that was a point which we would want clearly covered in the agreement.

Q. Yes. In other words, you said that that was one of the obligations in the over-lease which [32] Spiegel would not assume?

A. No, sir. I said that that was one of them which we would not take subject to.

Q. And you insisted upon an exception in the sub-lease specifically eliminating it?

A. Correct.

Q. Then you saw the provision for default without any period of grace and insisted on a 15 day grace provision, did you not? A. Correct.

Q. And you said, in drawing your sub-lease, "We are going to put them in specifically?"

A. That is correct.

Q. And you insisted on some changes in the fire clauses, did you not? A. That is correct.

Q. Then you insisted on a provision for your protection in the event any part of the premises were taken by eminent domain?

A. Yes, sir.

Q. And you insisted in writing the sub-lease that those items be excepted? A. Yes.

Q. And you or Mr. Spiegel, in your presence, asked Mr. Coles specifically to alter the over-lease in those respects, did you not? [33]

A. No, sir.

Q. You told him specifically that in the instrument you were preparing you were going to except those provisions, did you not?

(Testimony of William H. Klein.)

A. I said that we would except those from those things that we took subject to.

Mr. Shimmel: That is all.

Redirect Examination

By Mr. Trask:

Q. Mr. Klein, was there any discussion at that time that Spiegel was to pay the existing rent that Dorris-Heyman was paying in addition to the rent that Spiegel proposed to pay in the sub-lease?

A. No, sir.

Mr. Shimmel: I object to that, your Honor, being entirely immaterial. The sub-lease specifically provides for the rent.

The Court: Well, the question has been answered.

Q. (By Mr. Trask): Was there any discussion at that time about the payment of taxes; specific discussion about that at all? A. No, sir.

Q. Now, in connection with the closing of [34] this transaction, was the transaction closed at that time by all parties, Mr. Klein?

A. No, it was not.

Q. Would you tell the Court how the transaction was handled with respect to its closing?

A. Well, I am going back also from memory of five years ago, but to my memory, the purchase agreement was signed by Spiegel and Mr. Coles, but not by Dorris-Heyman. The instruments were then signed by our local counsel in Phoenix. The

(Testimony of William H. Klein.)

sub-lease was drafted thereafter in accordance with the terms of the purchase agreement and sent to our local counsel, and to Mr. Coles. Additional documents were prepared by Mr. Coles and his counsel, and the exchange took place at Mr. Gust's office when all documents were satisfactory to both sides.

Q. That was in Phoenix? A. In Phoenix.

Q. Was that some time after the meeting in Chicago about which Mr. Coles has testified?

A. It was.

Q. Do you know whether or not Mr. Shimmel participated on behalf of Mr. Coles in the transaction prior to the closing in Mr. Gust's office?

Mr. Shimmel: That is admitted and shows on the [35] face of the record that I did participate in it.

Mr. Trask: Fine. Well, with that statement.

Mr. Shimmel: In the record. I will withdraw the question. That is all.

Recross-Examination

By Mr. Shimmel:

Q. Mr. Klein, do I understand you now to say that this instrument, the sub-lease, was not drafted in Chicago at the same time the agreement was?

A. I believe it was not. I believe it was drafted a few days after and transmitted a few days after. I am not positive of that, but my files would seem to indicate that.

(Testimony of William H. Klein.)

Q. You drew both of them, did you not?

A. Yes.

Q. Unmistakably your draftsmanship?

A. Yes, sir.

Q. And if Mr. Coles says he signed both of them there at the same time on July 17th, you think he is mistaken?

A. I believe he is. I am not certain of that, although, but there is——

Mr. Shimmel: That is all.

Mr. Trask: No further questions. [36]

(The witness was excused.)

Mr. Trask: The defendant rests, if the Court please.

Mr. Shimmel: May we have a few minutes recess, your Honor?

The Court: Very well.

(Thereupon, a short recess was taken, after which all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Mr. Shimmel: The plaintiff rests, your Honor.

The Court: All right. How do you want to submit this?

Mr. Shimmel: We would prefer to argue it at this time, your Honor.

The Court: All right, go ahead.

Mr. Trask: It wouldn't make any difference to me to argue it now, but I would like an oppor-

tunity to submit a brief because there is considerable documentary evidence in the record that I would like to correlate and present to the Court in orderly fashion.

The Court: All right.

Mr. Trask: I would prefer to do it that way. I would argue it at this time if——

The Court: You can both submit briefs and after [37] I read your briefs I will set it down for argument. I may not reach it for several months.

Mr. Trask: I would prefer it that way.

Mr. Shimmel: Very well. Since we have submitted a comprehensive brief already, I think, fully outlining all of our arguments upon the motion for summary judgment or judgment on the pleadings, if agreeable, I'd waive an opening brief and let the defendant file its contentions here.

The Court: Very well.

Mr. Shimmel: I think our contentions are all on record.

The Court: I think so, probably. Both sides have covered it very well.

Mr. Trask: I have some additional authorities I'd like to submit particularly in the light of this evidence.

The Court: What do you want, 20 days or 10 days to file a reply?

Mr. Trask: Did I hear the Court say that it probably would not get to it within the next two or three weeks anyway?

The Court: Yes.

Mr. Trask: My trial calendar is rather heavy now and if I can have 30 days within which to [38] submit my brief I would appreciate it.

The Court: All right.

Mr. Trask: And whatever time Mr. Shimmel feels he might need, he is welcome to have.

Mr. Shimmel: Well, 20 days would be sufficient.

The Court: Very well.

(Thereupon, the trial was ended at 11:10 o'clock, a.m., of the same day.) [39]

I hereby certify that the proceedings had upon the trial of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 39 typewritten pages constitute a full, true and accurate transcript of said shorthand record.

/s/ LOUIS L. BILLAR,
Shorthand Reporter.

[Endorsed]: Filed Feb. 6, 1950.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Coles Trading Company, a corporation, Plaintiff, vs. Spiegel, Inc., a corporation, Defendant, numbered Civil-1306 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that said original documents, and said copies of the minute entries, constitute the record on appeal in said case, as designated in the Appellant's Designation filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Plaintiff's Complaint, filed April 18, 1949.
2. Defendant's Answer, filed May 9, 1949.

3. Minute entry of September 26, 1949 (trial setting).

4. Minute entry of October 24, 1949 (hearing on Motion for Judgment on Pleadings).

5. Minute entry of December 22, 1949 (order denying Motion for Judgment on Pleadings).

6. Minute entry of January 5, 1950 (proceedings of trial).

7. Plaintiff's exhibits 1, 2, 3 and 4, filed January 5, 1950.

8. Defendant's exhibits A, B, C, D, E and F, filed January 5, 1950.

9. Reporter's Transcript, filed February 6, 1950.

10. Minute entry of March 13, 1950 (order setting case for oral argument).

11. Minute entry of March 20, 1950 (case argued and submitted).

12. Minute entry of May 24, 1950 (order that defendant have judgment).

13. Defendant's Proposed Findings of Fact, Conclusions of Law, and Judgment, filed May 29, 1950; and signed by trial judge and refiled and docketed July 3, 1950.

14. Minute entry of June 1, 1950 (order extending time to file objections).

15. Plaintiff's Objections to Defendant's Proposed Findings of Fact, and Conclusions of Law,

and Plaintiff's Proposed Findings of Fact and Conclusions of Law, filed June 12, 1950.

16. Minute entry of June 26, 1950 (hearing on Proposed Findings of Fact and Conclusions of Law).

17. Plaintiff's Notice of Appeal, filed July 31, 1950.

18. Plaintiff's Bond on Appeal, filed July 31, 1950.

19. Statement of Points on which Plaintiff-Appellant Intends to Rely on Appeal, filed July 31, 1950.

20. Plaintiff and Appellant's Designation of Contents of Record on Appeal, filed July 31, 1950.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of $4.80 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 1st day of September, 1950.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 12673. United States Court of Appeals for the Ninth Circuit. Coles Trading Company, a corporation, Appellant, vs. Spiegel, Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed September 5, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12673

COLES TRADING COMPANY, a Corporation,
Appellant,

vs.

SPIEGEL, INC., a Corporation,
Appellee.

DESIGNATION OF PARTS OF THE RECORD WHICH APPELLANT CONSIDERS NECESSARY FOR THE CONSIDERATION OF THE APPEAL

To the Clerk of the Above Court:

Appellant respectfully designates the following parts of the record on appeal in the above case as necessary for the consideration on appeal, and respectfully requests that the Clerk print the following parts of the record only, to wit:

1. Plaintiff's complaint.

2. Defendant's answer.

3. Reporter's Transcript of the Evidence.

4. Findings of Fact, Conclusions of Law and Judgment, proposed on May 29, 1950, and approved and entered on July 3, 1950.

5. Plaintiff's objections to defendant's proposed findings of fact and conclusions of law; and plaintiff's proposed findings of fact and conclusions of law filed June 12, 1950.

6. Notice of appeal.

7. Bond on appeal.

8. Statement of points on which plaintiff intends to rely on appeal.

9. All exhibits designated Plaintiff's 1 to 4, inclusive, and Defendant's A to F, inclusive.

10. Each and every minute entry and order rendered and entered by the trial court.

11. Appellant's designation of contents of record on appeal.

12. Statement adopting statement of points on which plaintiff and appellant intends to rely on appeal.

13. This designation of parts of the record which appellant considers necessary for the consideration of the appeal.

Dated this 31st day of July, 1950.

SHIMMEL, HILL & HILL and
BLAINE B. SHIMMEL,

By /s/ ROUALD W. HILL,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 11, 1950.

No. 12,673

IN THE

United States Court of Appeals

For the Ninth Circuit

COLES TRADING COMPANY, a Corporation,
Appellant,

vs.

SPIEGEL, INC., a Corporation,
Appellee.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United States for the District of Arizona.

EVANS, HULL, KITCHEL & JENCKES
NORMAN S. HULL
807 Title & Trust Building
Phoenix, Arizona
Attorneys for Appellants.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

SUBJECT INDEX

	Page
Jurisdictional Statement	1
Statement of the Case	2
Specifications of Errors	5
Summary of Argument	6
Argument	7
I. Under the Contract Between the Parties, Spiegel Assumed the Obligation to Pay Excess Taxes	7
A. By the Physical Incorporation of the Lease, and by the Reference Made to It in the Contract, Spiegel Assumed Its Burdens	8
B. The Circumstances Surrounding the Making of the Contract and the Conduct of the Parties Support This Construction	12
II. The Contract Constitutes an Assignment and Places the Burden on Spiegel to Pay the Taxes as a Matter of Law	16
A. The Contract Is an Assignment	17
B. Spiegel, as Assignee, Is Liable on the Covenant to Pay Taxes	20
Conclusion	24

Pages

CASES

Burnett v. Lynch, 5 Barn & C. 589, 108 Eng. Reprint 220 (1826) 22

City of Lake View v. MacRitchie, 134 Ill. 203, 25 N.E. 663 (1890) 11
Consolidated Coach Corp. v. Consolidated Realty Co., 251 Ky. 614, 65 S.W.2d 724 (1933) 18
Crowley v. Gormley, 59 App. Div. 256, 69 N.Y.S. 576 (1901) 21

Gardner v. Trigg, 59 Ariz. 397, 129 Pac.2d 666 (1942) 13

Homan v. Employers Reinsurance Corporation, 345 Mo. 650, 136 S.W.2d 289 (1939) 10
Hoover v. Odle, 31 Ariz. 147, 250 Pac. 993 (1926) 13
Hughes v. Young, 5 Gill & J. 67 (Md. 1832) 22

Kewanee Boiler Corp. v. American Laundry Mach. Co., 289 Ill. App. 482, 7 N.E.2d 461 (1937) 21

Marathon Oil Co. v. Lambert, 103 S.W.2d 176 (Tex. Civ. App. 1937) 18
Mason v. Smith, 131 Mass. 510 (1881) 21
McKeon v. Wendelken, 25 Misc. 711, 55 N.Y.S. 626 (1899) 22
Moule v. Garret, L.R. 5 Exch. 132 (1870) 21

National City Bank of Cleveland v. Citizens Building Co., 74 N.E.2d 273 (Ohio App. 1947) 15

Ocean Grove Camp Meeting Ass'n. of M. E. Church v. Reeves, 79 N.J.L. 334, 75 A. 782 (1910) 22

Paine v. Copper Belle Mining Co., 13 Ariz. 406, 114 Pac. 964 (1911) 12
Pendleton v. Brown, 25 Ariz. 604, 221 Pac. 213 (1923) 12, 15

Sexton v. Chicago Storage Co., 129 Ill. 318, 21 N.E. 920 (1889) 18, 19

Pages

Shreek v. Coates, 59 Ariz. 269, 126 Pac.2d 308 (1942) 17
Smiley v. Van Winkle, 6 Cal. 606 (1856) 19

Taylor v. Marshall, 255 Ill. 545, 99 N.E. 638 (1912) 19, 20

TEXTS

32 Am. Jur. 289, Sec. 313 17

STATUTES

Title 28, U.S.C., Section 1291 1
Title 28, U.S.C., Section 2107 1
Title 28, U.S.C., Section 1332(a)(1) 2

No. 12,673

IN THE

United States Court of Appeals

For the Ninth Circuit

COLES TRADING COMPANY, a Corporation,
Appellant,

vs.

SPIEGEL, INC., a Corporation,
Appellee.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United States for the District of Arizona.

JURISDICTIONAL STATEMENT

This is an appeal by the Coles Trading Company, as plaintiff, from a final judgment in favor of the defendant entered on July 3, 1950. Notice of appeal, accompanied by a supersedeas bond, was filed July 31, 1950 (R. 38, 39).

Jurisdiction of this appeal exists under Title 28, U.S.C., Section 1291, and Title 28, U.S.C., Section 2107. Jurisdic-

tion existed in the District Court under Title 28, U.S.C., Section 1332(a)(1).

Plaintiff instituted the action on April 18, 1949, by filing its complaint in the District Court of the United States for the District of Arizona, wherein judgment was sought against the defendant in the principal amount of four thousand five hundred and seventeen dollars and eighteen cents ($4,517.18) (R. 5), and wherein it was alleged that the plaintiff is a corporation existing under the laws of Arizona and that the defendant is a corporation existing under the laws of Delaware (R. 2). By its answer, the defendant admitted the jurisdictional allegations of the complaint (R. 22).

STATEMENT OF THE CASE

In April, 1938, the plaintiff leased from J. W. and Sallie G. Dorris three-fifths of a store building in downtown Phoenix.[1] The lease was to expire in 1949 with an option given to the plaintiff to renew for an additional period of ten years.[2]

Among the terms of this lease was a provision obligating the lessee to pay a three-fifths part of all property taxes in excess of $15,000, if, in any one year, the taxes should exceed that amount (R. 12, 13). The lease was to be binding on the successors and assigns of both parties (R. 14).

---

[1]The lessors later died, and title to the building is now held by a Phoenix bank as trustee. For the sake of convenience, both will be referred to simply as "owner." Plaintiff corporation was then doing business as the "Dorris-Heyman Furniture Co." It later changed its name to "Coles Trading Co.," and where convenient will be referred to as "Coles."

[2]The option has been exercised and the lease is now in full effect under the extended term.

Seven years later, the plaintiff sold to Spiegel the entire furniture business—including accounts and stocks of merchandise—in which it had been engaged on the leased premises (R. 45, 46).

To consummate this sale, the plaintiff's president, Frank E. Coles, made a trip to Chicago to confer with the officials of defendant, Spiegel, Inc. He was not accompanied by counsel, nor was he represented by counsel at the subsequent negotiations. After discussions on the matter of the store building, one William H. Klein, an attorney and assistant secretary of the defendant corporation, drew up a contract designated as a "Sub-lease"; by which the plaintiff transferred to the defendant the remainder of its term in the leased premises for a larger consideration than the rental paid by Coles to the owner. The contract was signed in Chicago by the proper officers of Spiegel and by Mr. Coles. Mr. Coles then returned to Phoenix where the secretary of the plaintiff corporation also signed the contract, and where the signatures were acknowledged. The effect of this instrument is the subject of the present controversy.

By the terms of the contract, Coles transferred the property to Spiegel "subject to the terms of, and with all the rights, privileges and benefits granted" to Coles under the lease from the owner (R. 17). A photostatic copy of that lease was attached to the contract and by express stipulation was made a part of it (R. 17). In addition to the provision dealing with taxes, the original lease from the owner provides that the lessee shall also

(1) pay the excess cost of an eight point insurance policy over that of a fire policy (R. 8),

(2) pay for boiler explosion insurance (R. 8),

(3) pay half the cost of maintaining the heating plant (the rest is borne by the tenant of the other two-fifths of the building) (R. 17),

(4) make such repairs as may be necessary to keep the premises in good condition (R. 17).

No period of grace is given to the lessee.

The contract between Coles and Spiegel provides (R. 17) that "It is expressly understood and agreed, however, that anything in said over-lease to the contrary notwithstanding," Spiegel

(1) shall not be required to make structural repairs,

(2) shall not be in default "on matters other than rent" until thirty days after notice.

For four years afterwards, Spiegel, as tenant of the building, paid the amounts due on the two insurance policies and paid its share of the cost of maintaining the heating plant (R. 57). Towards the end of 1948, evidently for the first time, the taxes assessed against the property exceeded $15,000. When billed by the owner for the part of this excess due under the lease, Coles turned to Spiegel; but Spiegel refused the demand, and the bill was paid by Coles (R. 5, 25). Spiegel then repudiated all obligations arising under the original lease, and refused to make further payments for the insurance or for the upkeep of the heating system (R. 57).

More than thirty days after notice to the defendant, Coles brought this action to recover the amount paid on account of the excess taxes.

At the trial, evidence was adduced supporting the foregoing statement, and showing that all the participants re-

ferred to the contract in question as a "Sub-lease," and that the owner consented to the arrangement only on condition that Coles should continue to be bound.

The court ruled that the contract did not impose an obligation on Spiegel to pay the taxes, and judgment was entered for Spiegel.

From that judgment Coles appeals.

SPECIFICATIONS OF ERRORS

I.

The District Court erred in finding that the instrument in question contained no provision requiring Spiegel to pay the excess taxes, since an examination of the contract shows that the defendant undertook to perform all of the obligations of the lease not otherwise dealt with.

II.

The District Court erred in finding that it was not the intention of the parties that Spiegel should pay the excess taxes, since such a finding is contrary to the provisions of the written contract and contrary to the evidence.

III.

The District Court erred in its conclusion of law that no legal obligation had been proved requiring Spiegel to pay the excess taxes, since the contract between the parties establishes such an obligation, and since the contract, being in reality an assignment, imposes that obligation on Spiegel as a matter of law.

SUMMARY OF ARGUMENT

By incorporating into its contract with Coles a copy of Coles' lease with the owner, Spiegel accepted the provisions of that lease and assumed all the obligations there imposed on the tenant which were not otherwise covered by agreement between the parties. If that is not true, then the care taken to attach a photostatic copy of the original lease, and to provide specifically that it become a part of the contract was an empty ritual. If any doubt remained, it would be dissipated by an examination of the contract itself, which demonstrates that Spiegel considered itself bound by the lease, since it felt constrained to make certain exceptions to the burdens imposed upon it—particularly the duty to make all necessary repairs, and the duty to perform promptly. Spiegel obtained a reduction of these burdens by a provision excusing it from making structural repairs, and by another allowing it a thirty-day period of grace "on matters other than rent." Unless the obligations of the original lease were intended to be a part of this contract, then there were no "matters other than rent" on which Spiegel could have been in default. Added to all this is the stipulation that the conveyance is made "subject to the terms of, and with all the rights, privileges and benefits" granted to Coles under the original lease.

Even if the lease had not been incorporated into this contract, and even if the lease had never been referred to in the contract, and even—in fact—if Spiegel had never known that the lease existed (assuming a proper recording), Spiegel would nevertheless be obligated by law to pay these taxes. By accepting a transfer of all that Coles possessed, Spiegel subjected itself to all covenants which run with

the land, and the covenant to pay the taxes is one running with the land.

If Spiegel wished to escape the liability for these taxes, it was incumbent upon Spiegel to insert in the contract a provision so stating, assuming it could have persuaded Coles to agree (which, of course, it could not have done).

The instrument now before this court was the culmination of a conference in Spiegel's office where Spiegel was represented and acted by its lawyer, whereas Coles was not so represented. Furthermore, every provision in the contract was composed by William H. Klein, who was not only the attorney for Spiegel, but one of its executives.

As a matter of the proper interpretation of contracts and the rules of property law, no other conclusion is possible but that Spiegel is obliged to pay these taxes.

ARGUMENT

I. Under the Contract Between the Parties, Spiegel Assumed the Obligation to Pay Excess Taxes.

Entirely apart from the law of assignments, a reading of the contract between Coles and Spiegel is sufficient, of itself, to establish an undertaking by Spiegel to perform the obligations of the original lease as to all matters not otherwise covered. The judgment of the District Court overlooks the fact that a copy of the lease was attached to, and made a part of, the contract, and that several provisions of the contract are meaningless unless it was intended that Spiegel be bound by the lease.

Because of the transaction out of which this contract grew, and because of the interpretation put on it by Spiegel, itself, any doubt about its effect must be resolved in favor of Coles.

A. BY THE PHYSICAL INCORPORATION OF THE LEASE, AND BY THE REFERENCES MADE TO IT IN THE CONTRACT, SPIEGEL ASSUMED ITS BURDENS.

An examination of the contract upon which this action is brought would reveal that it is made up of two parts—an agreement signed by Coles and Spiegel and, attached to that, a copy of a lease signed by Coles and the owner. It will not be assumed that this second part is there for no other purpose than to make a more impressive looking document. It is there because the parties intended it to have some effect upon the first part of their contract. And if that is what the parties intended, then the law will recognize and give effect to such intent. Without so much as a glance at the provisions of either part of the contract, the inference immediately arises that the parties must have intended to make use of some of the provisions of the copy.

Each instrument is in the form of a lease. The copy imposes certain obligations on the lessee, Dorris-Heyman, (Coles' former name) and the other provides that the premises are leased to Spiegel, Inc., "subject to the terms of, * * *, a certain lease * * *, a photostatic copy of which over-lease is attached hereto and made a part hereof" (R. 17).

Included among the "terms of" that lease are the provisions requiring the lessee to bear a part of the taxes in excess of $15,000, to pay for certain insurance, and to make whatever repairs might be necessary to keep the premises in good condition. If Spiegel did not think itself bound by these terms, then there was no point in providing that Spiegel should *not* be required to make any "structural" repairs "anything in said over-lease to the contrary notwithstanding." The over-lease provides that if the premises are entirely destroyed, then both parties will be released

from any further obligation. If Spiegel did not think itself bound by this term, then there was no point in providing that it *alone* should have an election to terminate "notwithstanding" anything in the overlease. The over-lease provides that rent shall be paid promptly and without demand. If Spiegel did not think itself bound, then there was no point in providing for a fifteen-day period of grace "notwithstanding" anything in the over-lease, and with a right to set-off against the rent any money owed to it by Coles "notwithstanding" anything in the over-lease. The over-lease contains no provision for termination except for total destruction by fire. If Spiegel did not think itself bound by the lease, then there was no point in providing that it should have a right to terminate in case of eminent domain proceedings "notwithstanding" anything in the over-lease. If the terms of the over-lease are disregarded, then Spiegel made a promise of a certain monthly payment and a promise to make ordinary repairs, but incurred not a single other duty or obligation. Unless Spiegel thought that the over-lease imposed additional obligation upon it, then there was small necessity for providing a thirty-day period of grace "on matters other than rent." If the over-lease is not a part of the contract, then there was only one "matters other than rent."

The only reasonable conclusion is that the parties intended to do what they said they intended to do—make the prior lease a part of the agreement. The District Court was not justified in ignoring a part of the contract that seems crucial to the issue.

This contention is further re-enforced by the provision that the transfer is made "subject to the terms of" the lease.

Probably there are as many definitions of that phrase as there are cases in which it has arisen, and the only assistance to be drawn from them is that the meaning changes with the context. Where a conveyance of land is made "subject to" a mortgage, it is ordinarily held that the grantee is not personally liable. But that does not make the phrase meaningless, for there is still the land to be liable for the debt. Here, unless Spiegel is subject to liability on the lease, that phrase means nothing. In this case it cannot be said that the owner's own land is liable on an obligation to the owner. Only Spiegel remains as a subject in which this phrase can apply. The ruling of the District Court is the equivalent to striking it out entirely.

The court in *Homan v. Employers Reinsurance Corporation,* 345 Mo. 650, 136 S.W.2d 289 (1939), held that the phrase "subject to" was sufficient to bind a defendant by the terms of a prior contract to which it was not a party. The defendant had made a contract to indemnify the now bankrupt insurance company "subject to" the conditions of the original policy. The holder of that policy, unable to collect from the insolvent insurance company, brought action against the defendant. Judgment was given for the policyholder despite the absence of any loss to the bankrupt. The court said:

> "* * * The words 'subject to' are defined by lexicographers as meaning 'liable,' and the word 'liable' is defined as 'bound or obligated in law or equity; responsible; answerable.' * * *"

Furthermore, the contract provides that Coles shall use its best efforts to persuade the owner to allow Spiegel to sublet the premises (R. 19). Unless Spiegel intended that

the original lease should form a part of its contract, then it could be no concern of Spiegel's what the owner might do. If Spiegel did not assume the lease then there was no privity of contract between Spiegel and the owner, and such consent would be unnecessary. Spiegel, by inserting this provision, plainly showed that it thought itself bound by the over-lease, which prohibits subletting without the permission of the owner (R. 9).

In that same paragraph of the contract (R. 9), it is provided that this consent from the owner is to be obtained "on the condition that" Spiegel "shall not thereby be relieved of any liability." If Spiegel was never liable to the owner, then it had no need to provide for a continuation of that liability. Again, the indication is clear that Spiegel intended to assume the original lease.

Finally, there must be considered the action of the parties in attaching a copy of the lease to the contract and making it "a part hereof." There was no purpose in doing this unless the parties intended to incorporate the lease into their contract. The effect of this incorporation can only be that the "lessee" under the second agreement accepted the obligations imposed on the "lessee" in the first agreement, with whatever exceptions the parties might agree upon. Destruction by fire, repairs, rent, termination, and the duty of prompt performance were dealt with in the primary agreement. As to all other matters, the provisions of the attached copy must control. By agreeing to take the transfer "subject to the terms of" the lease, and by providing that a copy "is attached hereto and made a part hereof," Spiegel assented to that proposition and cannot now escape it. *City of Lake View v. MacRitchie,* 134 Ill. 203, 25 N.E. 663 (1890).

The action of the District Court was equivalent to tearing off the copy, striking out the phrase "subject to the terms of," striking out the incorporation provisions, and striking out the "notwithstanding" clause. As thus mutilated, the contract might provide what Spiegel now says it does. But as thus mutilated, it would not be the same contract which Coles signed. It would be the grossest injustice to impose obligations on Coles under a purported contract which it never assented to, never read, and never signed; or never heard of until Spiegel asserted it in the lower court.

B. THE CIRCUMSTANCES SURROUNDING THE MAKING OF THE CONTRACT AND THE CONDUCT OF THE PARTIES SUPPORT THIS CONSTRUCTION.

There is within the four corners of the instrument sufficient indication of the parties' intention to justify a reversal of the judgment below. If, however, the court should find some ambiguity in the contract, then it is proper to look at the circumstances surrounding its execution, and at the construction which the parties themselves have placed upon it. *Pendleton v. Brown,* 25 Ariz. 604, 221 Pac. 213 (1923); *Paine v. Copper Belle Mining Co.,* 13 Ariz. 406, 114 Pac. 964 (1911).

Coles operated a retail store in the leased building. That business, as a going concern, was sold to Spiegel and the contract here in question was a part of the transaction. Since Coles had no further interest in the business, it could want no further interest in the building. All that Coles could want from Spiegel was the payment of the stipulated sum every month. Aside from that, it would naturally wish to wash its hands of the whole business. However, it could

not completely do so because of its obligations to the owner under the original lease. The logical answer would be to have the new tenant assume the obligations of the lease. It submits that Spiegel has done precisely that.

At the negotiations which preceded the drawing of this lease the defendant was represented by its attorney, Mr. Klein. When it came to the actual drawing up of the contract, that, too, was done by Mr. Klein. Although the instrument was taken back to Phoenix for the signature of the plaintiff's secretary, not a syllable of it was changed. The final product is the work of the defendant's own attorney, who was also one of its officers. Consequently, the defendant must bear the responsibility for any ambiguity. *Gardner v. Trigg,* 59 Ariz. 397, 129 Pac.2d 666 (1942); *Hoover v. Odle,* 31 Ariz. 147, 250 Pac. 993 (1926).

That the construction here contended for is the one then accepted by the parties, may be seen from the futility of Mr. Klein's own attempts to put any other meaning on the agreement.

At the trial, when Mr. Klein was questioned about the differences between the original lease and the contract which he drew up—differences in the fire, termination and repair clauses—the following exchange took place:

> "Q. And you told Mr. Coles that you would not assume the obligation to make structural repairs to the building, did you not, either you or Mr. Spiegel, in your presence?
>
> A. I said that that was a point which we would want clearly covered in the agreement.
>
> Q. Yes. In other words, you said that that was one of the obligations in the over-lease which Spiegel would not assume?

A. No sir. I said that that was one of them which we would not take subject to."

* * * * * * *

"A. I said that we would except those things from the things that we took subject to." (R. 91, 92)

It is submitted that Mr. Klein's explanation is asinine. It was completely senseless to "except those things from the things that" he "took subject to" unless he knew that Spiegel would be bound if he failed to make those exceptions. If "subject to" is no more than a description of the interest conveyed, then he was powerless to enlarge upon it by making "exceptions." He could no more change the nature of the interest conveyed than the grantee of land subject to a mortgage could enlarge his interest by making exceptions to the mortgage note. Mr. Klein's tenacious insistence on using "take subject to" instead of "assume" suggests that he was not unacquainted with the mortgage cases. But the difference is that the grantee in such cases has no need and no power to make exceptions to the mortgage. Mr. Klein knew that there was both the power and the need to make exceptions to this lease, because he knew that Spiegel was accepting a personal obligation. If it was not a personal obligation, then there was nothing for Mr. Klein to make exceptions to. By his own testimony, and despite his avoidance of the literal term, the lawyer who drew the instrument all but admitted that the contract constitutes an assumption of the lease.

The correctness of this construction of the contract is further shown by Spiegel's own conduct. The original lease provides that the lessee shall pay a part of the dif-

ference in cost between eight point insurance and fire insurance. Spiegel did that for four years. The lease provides that the lessee shall pay a share of the cost of boiler insurance. Spiegel did that for four years, too. The lease provides that the lessee shall pay a part of the cost of maintaining the heating system, and Spiegel did that for four years. No mention is made of any of these matters except in the lease. The plain inference arises that Spiegel considered itself bound by the provisions of the lease until it was suddenly handed a tax bill for four and a half thousand dollars. Then, for the first time, it decided that the lease attached to its contract was a little stranger.

At the trial, of course, Mr. Klein testified that these payments were made without his knowledge, or without authorization of the legal department. This was a matter peculiarly within the knowledge of the defendant, and Coles is in no position to dispute it. But it seems odd that a bill submitted to Spiegel should be paid without question. Surely it is not customary for large department stores to pay any claim that happens to be addressed to them. But whether Mr. Klein, himself, knew of these payments or not, *some* agent of Spiegel's knew of them, and Spiegel performed its obligations under the lease for four years. This is a matter of legitimate consideration in construing the contract. *National City Bank of Cleveland v. Citizens Building Co.,* 74 N.E.2d 273 (Ohio App. 1947); *Pendleton v. Brown,* 25 Ariz. 604, 221 Pac. 213 (1923).

From all of these circumstances (whatever might be the situation if only one of them were present) the conclusion is inescapable that Spiegel assumed the obligations of the lease: The attaching of the original lease, the incorporation

provision, the "notwithstanding" clause, the phrase "subject to the terms of," the provision for obtaining consent from the owner to sub-lease, the "exceptions" explained by Mr. Klein, the performance of the obligations by Spiegel for four years, and the fact that Mr. Klein himself drew up the contract—all these when taken together leave room for no construction other than that of an assumption by Spiegel.

The District Court erred in ruling that the contract imposed no obligation on Spiegel to pay the taxes, and in finding that it was not the intention of the parties to impose such an obligation.

II. The Contract Constitutes an Assignment and Places the Burden on Spiegel to Pay the Taxes as a Matter of Law.

Everything that has been said in the first part of this brief applies to an assignment as well as to an assumption, since a complete assumption would include an assignment. All the considerations there advanced demonstrate that the contract was intended to act as an assignment, whatever it may have been called.

However, even if the contract did not include the lease, and even if it made no reference to the lease, Spiegel would nevertheless be obligated to pay the taxes. Since the instrument in question is in reality an assignment, Spiegel becomes bound by all covenants that run with the land, including the covenant to pay taxes. On these covenants, Spiegel is the one ultimately liable. Since Coles has suffered a loss by Spiegel's failure to perform, Coles is entitled to reimbursement.

A. THE CONTRACT IS AN ASSIGNMENT.

The Supreme Court of Arizona seems to have passed only once on the difference between a sub-lease and an assignment. That was the case of *Shreck v. Coates,* 59 Ariz. 269, 126 Pac.2d 308 (1942), where the court held that the retention by the original lessee of a right to occupy and engage in mining operations was sufficient to make the contract a sub-lease. In its opinion the court included the following quotation from American Jurisprudence:

> "'An assignment of a leasehold is a transaction whereby a lessee transfers his entire interest in demised premises or a part thereof for the unexpired term of the original lease, thereby parting with all of the reversionary estate in the property, and is thus distinguishable from a sublease which contemplates the retention of a reversion by the lessee. The form of the transaction is not material, its character in law being determined by its legal effect. * * *' 32 Am. Jur. 289, sec. 313."

By applying this test it becomes evident that the instrument now before the court is an assignment. The form of the instrument being immaterial, it makes no difference that the parties referred to one another as "lessor" and "lessee." Coles parted with all its interest in the land. There was nothing left of which Coles could be the lessor. The transfer was made for the entire term, and with "all the rights, privileges and benefits granted" Coles under the lease from the owner (R. 17). The fact that there are provisions in the contract which are not contained in the lease is immaterial. A reservation of a contractual right is not an interest in land and will not support a sub-lease.

In *Marathon Oil Co. v. Lambert,* 103 S.W.2d 176 (Tex. Civ. App. 1937), the lessee of land entered into a contract purporting to be a sub-lease which provided that: The original lessee should be obligated to make repairs; the "sub-lessee" could pay the owner if the original lessee should default; and if the use of the premises for the particular purpose should be prohibited by law, then the "sub-lessee" would have an option to terminate. The court pointed out that none of these provisions gave any property right to the original lessee and so, since the entire term had been transferred, the arrangement was an assignment.

The court said (p. 180):

> "We think it apparent that these provisions were placed in the contract for the exclusive benefit of the appellant, that it alone could have claimed a right thereunder, and that neither evidences the slightest intention * * * to retain a reversionary interest in the leased premises. A reversionary interest is a property right that belongs to the grantor, hence it is incongruous to say that such an interest may be based upon a provision of the conveyance inserted for the benefit alone of the grantee."

And in *Consolidated Coach Corp. v. Consolidated Realty Co.,* 251 Ky. 614, 65 S.W.2d 724 (1933), an instrument purporting to be a sub-lease was held to be an assignment, notwithstanding the fact that it contained a covenant by the "sub-lessee" not to use the property for a particular business. The court held that such a covenant did not reserve in the original lessee any right to use the property, and so did not constitute a reversion. The following paragraph was quoted from *Sexton v. Chicago Storage Co.,* 129 Ill. 318, 21 N.E. 920 (1889):

> "* * * The more recent English decisions, and all of the text-books treating of the question which have been accessible to us, hold that, where all of the lessee's estate is transferred, the instrument will operate as an assignment notwithstanding that words of demise instead of assignment are used, and notwithstanding the reservation of a rent to the grantor, and a right of reentry on the non-payment of rent or the non-performance of other covenants contained in it. * * *"

In the case at bar, the lessee did not reserve a right of entry for non-payment of the rent, nor did it reserve such a right on any other condition. The fact that the second agreement contains a promise to pay rent does not change the result. *Smiley v. Van Winkle,* 6 Cal. 606 (1856). Since Coles transferred all its interest in the land, the money payable to it is not, properly speaking, rent at all, but a contractual obligation arising from the assignment.

In *Taylor v. Marshall,* 255 Ill. 545, 99 N.E. 638 (1912), the lessee, under a lease providing for a $100 monthly rental, "sub-leased" the premises for the remainder of the term at $150 a month. A judgment creditor levied on the interest of the original lessee under a statute providing for liens on leasehold interests. The court held that the levy was void, since at the time, the original lessee no longer possessed any leasehold interest. The transfer was an assignment despite the reservation of rent and of a right of reentry. The reservation of the $150 monthly payment was a contractual right, not a property right, and consequently there was nothing upon which the levy could be made.

None of the terms of the contract here before the court can be construed as reserving any property right in the

plaintiff. All the provisions dealing with the land are obviously there for the sole benefit of Spiegel, and constitute an undertaking by Coles to relieve Spiegel from a part of the burden imposed by the covenants. A contractual *obligation* is not a property *right*.

There is in the contract no evidence of any intention that Coles should continue to exercise dominion over the property. Coles transferred to Spiegel all its "rights, privileges, and benefits," by the very terms of the contract (R. 17). If the parties had intended that Coles should maintain an interest in the land itself, the natural thing would have been to reserve to Coles a right of entry for breach of Spiegel's promises to pay rent and make repairs. No such right was reserved. (Even if it had been, this would still be an assignment. *Taylor v. Marshall, ante*).

There is, in fine, no indication that Coles should have any rights whatsoever in the land. By the terms of the contract, there is no contingency on the occurrence of which Coles would have a right to repossess. Spiegel received everything that Coles could grant.

B. SPIEGEL, AS ASSIGNEE, IS LIABLE ON THE COVENANT TO PAY TAXES.

By entering into possession under this contract, Spiegel bound itself to perform all covenants except those which might be personal between Coles and the owner. On covenants which run with the land, the tenant in possession is the party ultimately liable, since he is the one in privity of estate with the owner. The owner may require Coles to perform because of the privity of contract existing between them, but such a performance by Coles gives it a right of action against Spiegel. Coles is in a position similar

to that of a surety, and, upon a default by the tenant, it may cure the default and recover from the tenant.

Mason v. Smith, 131 Mass. 510 (1881), was an action brought by a lessee against his assignee to recover for taxes which the lessee had been required to pay to the owner. The court gave judgment for the lessee, saying (p. 512):

> "The assignee of a lessee takes the whole estate of the lessee in the premises, subject to the performance on his part of the covenants running with the land, under the terms of the lease. By accepting and entering under the assignment, the law implies a promise to perform the duties thus imposed upon him. If through his neglect or refusal to perform them, the lessee is obliged to pay rent, taxes or other sums of money to the lessor under the covenants of his lease, he may recover the same from his assignee. * * *"

Moule v. Garret, L. R. 5 Exch. 132 (1870), was a similar action brought by the lessee against his assignee. In holding for the plaintiff the court said this:

> "It is true that there is no express contract between the parties, but they are each liable to the lessor for the performance of the covenants. They are each directly liable, and the lessor may sue either, at his option; but the assignee, having, at the time, the estate which has been the consideration for the covenants, ought, as between himself and the lessee, to perform them."

To the same effect are:

Kewanee Boiler Corp. v. American Laundry Mach. Co., 289 Ill. App. 482, 7 N.E.2d 461 (1937);

Crowley v. Gormley, 59 App. Div. 256, 69 N.Y.S. 576 (1901);

McKeon v. Wendelken, 25 Misc. 711, 55 N.Y.S. 626 (1899);

Burnett v. Lynch, 5 Barn & C. 589, 108 Eng. Reprint 220 (1826).

Therefore, even if one ignores the indications of an express assumption, the liability for these taxes nevertheless rests upon Spiegel. This is entirely proper. Spiegel took from Coles all the interest in the land that Coles had. He who gets the benefit of ownership must bear its burdens. That the foregoing axiom applies here, appears from other tax cases. When an owner of land leases it to another for a period of years with no stipulation as to who shall pay the taxes, that liability ordinarily rests with the landlord. He is the underlying owner, and whatever is a benefit to the land is a benefit to him. And so it will be presumed that, as between the parties, he was intended to pay the taxes. But where the lease is for a very long term, such as ninety-nine years, the landlord's ownership becomes something insubstantial. In such cases the tenant is the owner in all else but name, for the landlord has transferred practically all he had. So the rule changes, and the tenant rather than the landlord is presumed to have agreed to pay the taxes. *Hughes v. Young,* 5 Gill & J. 67 (Md. 1832); *Ocean Grove Camp Meeting Ass'n. of M. E. Church v. Reeves,* 79 N.J.L. 334, 75 A. 782 (1910).

In the instant case, the lessee expressly undertook to pay taxes if they should exceed a certain amount. Since Coles would be the one to gain from a future increase in the value of the property, it was appropriate that Coles should pay whatever taxes might result from such an increase in value. But after Coles transferred the property,

Coles could no longer receive that benefit. The transferee —Spiegel—then became the one to benefit by any such appreciation.

The value of a store building located in the downtown section of a growing western city can increase tremendously over a period of fourteen years. Coles gets no benefit from such a development, since it no longer has any interest in the building. The rule of law which requires Spiegel to pay these taxes is not simply a technicality of property law, it is a rule of presumed intention. Since the occupant of the premises receives the benefit of any increase in the value of the land, it is presumed that the parties intend him to bear the burdens that might accompany such an increase. Of the three parties involved, Coles, alone, is the one who derives no benefit whatsoever from an appreciation in the value of the land.

If the tax payments due under the lease can jump from zero to four and a half thousand dollars in one year, it is not inconceivable that they may increase to eleven or twelve thousand dollars during the succeeding ten years during which the contract remains in effect. If the contentions of Spiegel were allowed, then Coles would have to pay to the owner as rent and taxes more money than it received from Spiegel as consideration for the transfer, a result which Coles certainly would not have permitted, and which neither party could have contemplated. Doubtless the parties could have agreed to shift this liability to Coles, but they have not done so. Spiegel, therefore, remains liable.

The District Court clearly erred in ruling that no legal obligation had been proved requiring Spiegel to pay the taxes.

CONCLUSION

It might be contended that this arrangement, construed either as a simple assignment or as both an assignment and an assumption, was an inartistic means of accomplishing what was intended to be accomplished. If that is so, it is immaterial. Artistry is no prerequisite to legality.

Whether the instrument is construed as a sub-lease, as an assignment, or as an assumption, or as both an assignment and an assumption, Coles ought to have prevailed in the lower court.

Wherefore, Coles respectfully urges this Honorable Court to enter judgment in its favor.

EVANS, HULL, KITCHEL & JENCKES
NORMAN S. HULL
807 Title & Trust Building
Phoenix, Arizona
Attorneys for Appellant.

No. 12,673

IN THE

United States Court of Appeals

For the Ninth Circuit

COLES TRADING COMPANY, a corporation,
Appellant,

vs.

SPIEGEL, INC., a corporation,
Appellee

APPELLEE'S BRIEF

JENNINGS, STROUSS, SALMON & TRASK
OZELL M. TRASK
619 Title & Trust Building
Phoenix, Arizona
Attorneys for Appellee

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

SUBJECT INDEX

	Page
Jurisdiction	1
Statement of the Case	1
Summary of Argument	5
Argument	6
I. There Was No Assumption by Spiegel of the Obligation of Coles to Pay Excess Taxes	6
II. The Sublease Is Not an Assignment and Does Not Create an Obligation to Pay Taxes as a Matter of Law	19
Conclusion	27

TABLE OF AUTHORITIES CITED

Cases	Pages
Atlantic Refining Co.v. Wyoming National Bank, 356 Pa. 226, 51 Atl. (2) 719 (1947)	17
City of Lake View v. MacRitchie, 134 Ill. 203, 25 N.E. 663 (1890)	13
Cockerill v. Tobin, 59 Cal. App. 112, 209 Pac. 1022 (1922)	7
Consolidated Coach Corp. v. Consolidated Realty Co., 251 Ky. 614, 65 S.W.(2d) 724 (1933)	24
Consolidated Coal Co. v. Peers, 166 Ill. 361, 46 N.E. 1105 (1896)	7, 8, 9
Cox v. Butts, 48 Okla. 147, 149 Pac. 1090 (1915)	7, 9, 10
Englestein v. Mintz, 345 Ill. 48, 177 N.E. 746 (1931)	7, 10
Hart v. Socony-Vacuum Oil Co., 291 N.Y. 13, 50 N.E.2d 285 (1943)	7
Hobbs v. Cawley, 35 N.M. 413, 299 Pac. 1073 (1931)	19
Homan v. Employers' Reinsurance Corp., 345 Mo. 650, 136 S.W.(2d) 289 (1939)	12, 13
Indian Ref. Co. v. Roberts, 97 Ind. App. 615, 181 N.E. 283 (1932)	19, 20, 21, 22, 23
Marathon Oil Co. v. Lambert, 103 S.W.(2d) 176 (Tex. Civ. App. 1937)	24
Meyer v. Alliance Inv. Co., 84 N.J.L. 450, 87 Atl. 476 (1913)	7, 9
Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N.W. 265 (1919)	25
Orr v. Neilly, 67 Fed.(2) 423 (C.C.A. 5th 1933)	19
Reid v. Weissner, 88 Md. 234, 40 Atl. 877 (1898)	7
Saling v. Flesch, 85 Mont. 106, 277 Pac. 612 (1929)	19
Shreck v. Coates, 59 Ariz. 269, 126 P.(2d) 308 (1942)	19, 23

Pages

S. T. McKnight Co. v. Central Hanover Bank & Trust Co., 120 F.2d 310 (C.C.A. 8th Circuit 1941) 7; 11

United States v. Patrick J. Hickey, 17 Wall. 9-14, 21 L.Ed. 559 (1873) 22, 23

STATUTES

Sec. 27-1215 Arizona Code Annotated, 1939 22

TEXTS

20 Am. Jur. par. 1099, p. 958 7

20 Am. Jur. par. 1144, p. 998 13

32 Am. Jur. par. 348, p. 306 25

51 C.J.S. 556 19

No. 12,673

IN THE

United States Court of Appeals

For the Ninth Circuit

COLES TRADING COMPANY, a corporation,
Appellant,

vs.

SPIEGEL, INC., a corporation,
Appellee

APPELLEE'S BRIEF

JURISDICTION

No contention is made by the appellee that jurisdiction does not exist in this Court, or that it did not exist in the District Court, and the appellant's jurisdictional statement is accepted as correct.

STATEMENT OF THE CASE

The appellant's statement of the case is not in all respects accurate and requires some amplification to clearly present the issues.

The plaintiff's complaint seeks recovery of a sum of money alleged to be due as an excess of taxes by virtue of the terms of a sublease between the parties. There is attached to the complaint a copy of the lease (R. 6) and the sublease (R. 15). The answer admits the execution and delivery of the lease and sublease (R. 22) and denies the existence of the obligation alleged by the plaintiff.

At the trial the plaintiff sought to introduce evidence of the circumstances attending the drafting and execution of the sublease, evidence of the intention of the parties, and contended that the instrument was an assignment and not a sublease as it had been designated in the pleadings. The defendant objected to all of such testimony and evidence upon the ground that the negotiations of the parties had been integrated into a written document (R. 45, 46, 59) and that extrinsic evidence was not admissible to vary its terms. The evidence was nevertheless received over objection. Despite this testimony of plaintiff's President, and the other evidence admitted over objection, the trial court found as a fact (R. 31, 32):

(1) That there was no provision in the sublease obligating the defendant to pay any excess of taxes; and

(2) That there was no intention on the part of the parties to the sublease, as alleged in plaintiff's complaint, that the defendant should assume and agree to pay any such excess of taxes.

In appellant's statement of the case it is asserted that Mr. Coles was not represented by an attorney during negotiations for the sale of the business in connection with which the sublease was entered into, and that the sublease was prepared by Spiegel's attorney in Chicago and signed there by Mr. Coles without advice of counsel.

Since this contention is referred to throughout appellant's brief, and legal significance is attached to it, appellee desires to point out that these facts are in some respects in sharp dispute and in some respects incorrect. Mr. Klein, attorney for Spiegel, testified that the transaction was not closed during the course of Mr. Coles' visit to Chicago (R. 93) but was closed some time later in Phoenix (R. 94). In particular, he testified that the sublease was drafted after the conference in Chicago and mailed to Mr. Coles in Phoenix (R. 94). This is consistent with the face of the sublease which shows that it was acknowledged by an official of Spiegel in Chicago on July 17th and was acknowledged by Mr. Coles in Phoenix on July 23rd. The acknowledgment by Mr. Coles was before Mr. Blaine B. Shimmel, who was Mr. Coles' attorney and who represented him in the trial court (R. 21). Moreover, Mr. Coles admitted on cross-examination that he had consulted Mr. Shimmel during the course of negotiations (R. 63). And, finally, Mr. Shimmel himself admitted that he did participate in the transaction on behalf of Mr. Coles prior to the time it was closed (R. 94). Mr. Coles, therefore, by his own admission and that of his attorney was represented by counsel in the negotiations and in the consummation of the transaction.

The overlying lease provided that there could be no assignment or subletting without the consent of the lessors (R. 9). In connection with the consummation of the transaction, and pursuant to this requirement, Coles made a written request to the Valley National Bank, as Trustee under the Will of the lessors, for permission to sublease the premises to Spiegel, and enclosed a copy of the proposed sublease (R. 68-69). In granting permission to sub-

let to Spiegel, the Trustee referred to certain provisions in the sublease at variance with the overlying lease, and pointed out that those provisions were between the tenant and sub-tenant only and consent was given upon the express understanding that the provisions of the overlying lease remained binding upon the tenant and that the lessor would continue to look to the original tenant to carry out the provisions of the lease "anything to the contrary in the sublease notwithstanding." (R. 72, 73)

Following the execution and delivery of the sublease, it was supplemented and amended by agreements providing that the original lessors would notify Spiegel in the event Coles defaulted in the performance of any of its obligations, and that in such event Spiegel could cure the default and charge the amount thereof against any rental due Coles from Spiegel. (Defendant's Exhibit E in evidence; R. 78). At the time these provisions were negotiated, Mr. Klein corresponded with Mr. Shimmel and attempted to persuade Mr. Shimmel to agree that in the event Coles defaulted Spiegel could take an assignment of Coles' interest in the lease (R. 84). Mr. Shimmel refused upon the ground that this would eliminate the sublease which was never contemplated (Defendant's Exhibit F in evidence; R. 86).

There were no further negotiations or documents executed, and the parties entered upon the performance of their respective agreements until the present controversy arose. During that period of time the Phoenix store paid certain items that properly were not the obligations of Spiegel under the sublease. The items were minor and the error was not discovered until demand was made upon Spiegel for payment of excess of taxes, at which time the

matter was referred to the legal department (R. 88-89). It was thereupon determined that the obligations for excess of taxes as well as the minor items which had been paid without question were the obligations of Coles and not Spiegel and Spiegel refused to pay them. This action ensued.

SUMMARY OF ARGUMENT

Appellant in its summary of argument assumes that the only purpose which the parties could have for attaching a copy of the overlying lease to the sublease would be to cause the sublessee to undertake the performance of all obligations of the overlying lease. Therefore, since the overlease was attached and referred to, the subtenant did assume the obligations of the primary lease, and that, sayeth the plaintiff, is that. The appellant continues from this novel proposition to the even more novel proposition that if a party desires to escape liability for the payment of someone else's obligations, it must insert a provision in the agreement saying it will not be responsible for such obligations. This is somewhat remote from the orthodox concept that before a defendant may be charged with an obligation in a written instrument there must be a covenant or promise to pay.

It is the appellee's position that the sublease is clear, definite and unambiguous and as such, extrinsic evidence may not be resorted to for the purpose of altering or varying its meaning. The only language referring to the primary or overlying lease is the phrase "subject to the terms of." This language is language of limitation and not of assumption, and creates no obligation and infers no promise. Further, the instrument in question is not an

assignment but a true sublease; but whether or not it is an assignment or a sublease, the appellee is not bound by the covenants of the primary lease because it has contracted not to be.

ARGUMENT

I.

There Was No Assumption by Spiegel of the Obligation of Coles to Pay Excess Taxes

The entire burden of the first half of appellant's argument is to convince this Court that it ought to "construe" an obligation to pay taxes upon Spiegel, Inc. where there is no such express undertaking. Before answering appellant's "construction argument" it is well to point out that this is not an action to reform an instrument to express an intention which appellant would now desire to incorporate into it. It is an action to recover a sum of money based upon the language of a written instrument which is not in dispute and which is not ambiguous. Both parties were represented by counsel in the matter, and if the instrument did not express the intention of the parties there was ample opportunity to correct it. Appellant insists if Spiegel did not intend to become obligated to pay taxes it should have said so. Appellee perfers to believe the law to be that it is incumbent upon a party seeking to impose an obligation to clearly provide for it in the instrument and not leave the imposition of that obligation to the court as a matter of construction or implication. As a matter of elementary draftsmanship, it is difficult to believe that Coles' attorney would not have expressly inserted a promise by Spiegel to pay taxes if that obligation was intended to exist. The distinction between the phrase "subject to the terms of" and the phrase "assume and

agree to pay and perform according to the terms of" is so universally recognized and in such day-to-day use among attorneys that it is impossible to believe that the distinction was overlooked.

In any event it is the position of the appellee that the phrase "subject to the terms of" is plain, unambiguous and with a well-defined meaning and creates no affirmative obligation to pay. There is no other language in the instrument which even remotely suggests an affirmative obligation to pay. Under those circumstances it is evident that extrinsic evidence may not be referred to for the purpose of altering the plain meaning of the document, for it is conclusively presumed that the entire agreement of the parties is contained in that writing (see: 20 Am. Jur. par. 1099, p. 958).

Among the cases supporting the appellee's position regarding the effect of the words "subject to" are the following:

Consolidated Coal Co. v. Peers, 166 Ill. 361, 46 N.E. 1105 (1896);

Meyer v. Alliance Inv. Co., 84 N.J.L. 450, 87 Atl. 476 (1913);

Englestein v. Mintz, 345 Ill. 48, 177 N.E. 746 (1931);

Cox v. Butts, 48 Okla. 147, 149 Pac 1090 (1915);

S. T. McKnight Co. v. Central Hanover Bank & Trust Co., 120 F.2d 310 (CCA 8th Circuit 1941);

Hart v. Socony-Vacuum Oil Co., 291 N.Y. 13, 50 N.E. 2d 285;

Cockerill v. Tobin, 59 Cal. App. 112, 209 Pac. 1022 (1922);

Reid v. Weissner, 88 Md. 234, 40 Atl. 877 (1898).

One of the best examples of this distinction may be found in the case of *Consolidated Coal Co. v. Peers, supra.* In this case there was an assignment of a lease "subject to the agreements therein mentioned to be performed by said Lessee." The plaintiffs as the original lessors filed suit against the defendants to recover upon the ground that the quoted portion of the lease in the instrument imposed an affirmative obligation upon the defendant to perform the terms of the lease. The Court held that the language did not create an affirmative obligation to pay. Said the Court at page 1109:

> "There are several considerations that lead us to the conclusion that the words 'subject to the agreement,' etc., used in the deed of August 11, 1886, do not import a covenant on the part of the assignee to personally pay all rents or royalties that may accrue during the term: First. The weight of authority is otherwise. Second. The rule deducible from the decisions of this court in analogous cases is otherwise. Third. As has been suggested in some of the cases, it is the duty of a party who intends by a deed to bind another by a covenant in a former formal instrument to insert such covenant in the deed in such distinct and intelligible terms as that the party to be bound cannot be deceived, and not call upon the courts to infer such a covenant from equivocal words, which were probably understood by one party in a sense different from that sought to be ascribed to them by the other. Fourth. The assignee always takes the estate cum onere,—that is, he takes and holds it subject to the agreements agreed to be performed by the lessee,—and it is difficult to perceive why, upon sound legal principle, the mere expression of this legal implication should create a personal contractual obliga-

tion which the legal implication itself would not create. Fifth. It is the public policy of this state that the transmissibility of property should be free and unfettered; and to hold from mere inference, and in the absence of an express and plain covenant, that the assignee of a lease and his heirs will be personally liable for the payment of reserved rents which may accrue perhaps hundreds of years after such assignee has sold and assigned the lease to a third person, would tend to make leasehold estates unsalable, and tend to prevent the transfer of them to others."

Another case in point is that of *Meyer v. Alliance Inv. Co., supra,* in which there was an assignment of a lease subject to the terms and conditions and covenants contained in the lease. Said the Court at page 477:

"The claim of the plaintiffs to recover rent of the defendant rests upon the words of the consent, 'subject to all the terms, conditions and covenants contained in said lease.' As Lord Denman said in a similar case: 'These are words of qualification and not of contract.' Wolveridge v. Steward, 1 Cromp. & M. 644. The case is similar to a conveyance of land subject to a mortgage. The grantee is not personally bound unless there are words equivalent to an assumption of the mortgage. * * *"

In *Cox v. Butts, supra,* there was an assignment of a lease by one who was himself an assignee. The assignment was made "subject to the terms and conditions of said lease". The question was whether the subsequent assignee by those words had promised to perform certain obligations in the original lease. The Court held that the words "subject to" did not create any personal obligation

on the assignee to carry out the terms of the original contract. Said the Court at page 1092:

> "For the foregoing reasons we hold that there was no personal obligation placed upon Butts in the assignment to him, or in the contract agreement between him and Cox, whereby he became liable personally for any more than one-eighth of the expense incurred in development of the oil lease. The actual intent between Cox and Butts might, in fact, have been as plaintiff contends, but we cannot look further than the wording of the contract itself. It is the duty of one party who intends to bind another to do a certain thing by covenant in any written instrument to word the contract by the use of distinct and intelligible terms, so that there can be no misunderstanding and not call upon the courts to infer that the contract was intended to be a certain way, which was probably understood by one party in a sense different from that sought to be ascribed by the other."

In *Englestein v. Mintz, supra,* the Court had for consideration the meaning of the words "this agreement is subject to agreement this day entered into between Kaplan and Mintz and all covenants and agreements therein mentioned." The Court held that language was not uncertain nor ambiguous and did not impose any affirmative obligation to perform the terms of the agreement referred to. Said the Court at page 752:

> " * * * The words 'subject to,' used in their ordinary sense, mean 'subordinate to,' 'subservient to' or 'limited by.' There is nothing in the use of the words 'subject to,' in their ordinary use, which would even hint at the creation of affirmative rights. * * *"

The same situation has been passed upon by the Eighth Circuit Court of Appeals in the *S. T. McKnight Co. v. Central Hanover Bank & Trust Co., supra,* case. In this case there was an assignment of a lease "subject to all the terms and conditions of said lease." The Court held that the quoted words were not words of contract and did not import an affirmative obligation on the assignee. Circuit Judge Woodrough said at page 320:

> "But we are not so persuaded. We agree with the declaration of the trial court: 'That the words "subject to all the terms and conditions of said lease" do not impose contractual liability on an assignee to a lessor to carry out the covenants of a lease, seems to be the well supported rule. That they are words of qualification and not of contract appears to be well settled. See Wolveridge v. Steward, 1 Cromp. & M. 644. Also Consolidated Coal Co. v. Peers, 166 Ill. 361, 46 NE 1105 (38 LRA 624); Meyer v. Alliance Investment Co. 84 NJL 450, 87 A. 476. If we look for analogy to cases where land is conveyed subject to a mortgage, we find that Minnesota, in common with many other states, holds that land conveyed subject to a mortgage does not render the grantee personally liable unless by agreement he promises to pay or assume the debt. Clifford v. Minor, 76 Minn. 12, 78 NW 861. Manning v. Cullen, 50 Minn. 568, 52 NW 973.' "

It is respectfully submitted that the words "subject to" simply mean that unless the terms of the original lease are complied with that term will expire. Those words, however, do not define *whose* obligation it is to comply with the terms of the primary lease. If there is no assumption

of the terms of the sublease, the obligation remains that of the sublessor. Such is this case.

Appellant cites only one case, that of *Homan v. Employers' Reinsurance Corp.*, 345 Mo. 650, 136 S.W. (2d) 289 (1939) in support of its position that the words "subject to" impose an affirmative obligation. We believe a careful reading of the opinion does not support that conclusion. The phrase "subject to" in that case referred to a subsequent undertaking and not to a prior undertaking as in the present case. (See opinion at page 298.) Moreover the Court pointed out that the creation of the obligation was by other portions of the contract and that the words "subject to" were not used in the sense of creating the obligation, but rather of defining it. The opinion on rehearing makes this clear and is in fact additional authority for the appellee in the instant case. Said the Court at page 302 of the Unofficial Reporter:

> "It is further insisted that the words 'subject to' as used in the reinsurance agreement imply no assumption of obligation or liability. Cases are cited to the effect that when a grantee takes title to land by deed reciting that the conveyance is 'subject to' certain incumbrances, that the deed imposes no personal obligation or liability. * * *. It is said: 'The words "subject to," used in their ordinary sense, mean "subordinate to," "subservient to" or "limited by." There is nothing in the use of the words "subject to," in their ordinary use, which would even hint at the creation of affirmative rights.' Englestein v. Mintz, 345 Ill. 48, 177 N.E. 746, 752. However, this contention overlooks the fact that we are construing a contract of reinsurance which 'applies to the liability of the reinsured' and that such a contract necessarily implies

> the assumption of personal obligation and liability by the reinsurer, the extent of which is to be determined in the usual and ordinary manner by the consideration of the instrument itself and the words used therein and the references made. *The reinsurance contract creates the obligation and not the words 'subject to'.*" (Emphasis supplied.)

Appellant also cites the case of *City of Lake View v. MacRitchie,* 134 Ill. 203, 25 N.E. 663 (1890), in support of its contention that a reference to another document imposes an affirmative obligation to be bound by its terms. Again we must disagree. That was an action on a contractor's bond. The bond did refer to the contract and plans and specifications attached thereto. But the bond contained an express promise and undertaking on the part of the sureties obligating them to perform the contract and to indemnify the obligee in the event it was not performed according to its terms. In both cases cited by the appellant there is a well-defined original undertaking or promise. In the instant case that promise is the very element that is lacking.

If the Court agrees that the phrase "subject to" does have a well-defined meaning, then the parties are bound by their express undertaking and matters of "construction" become unimportant. As a matter of fact, under such circumstances extrinsic evidence is not admissible to vary the terms of the written instrument (20 Am. Jur. par. 1144, p. 998) and should not properly be considered where objection was made to its reception. Appellee believes, however, that its position is likewise supported in matters of construction and to that end will consider the arguments of the appellant on this phase of the case.

Appellant asserts that because the primary lease was attached to the sublease and made a part of it, that this fact is sufficient to "construe" an obligation upon the lessee that it did not expressly promise to perform. This argument has its foundation upon the assumption that the only purpose for attaching a copy of the overlease is to assume its obligations. Such an assumption overlooks the distinction between "promises" and "conditions." The promises to which Spiegel obligated itself were contained in the sublease. However, both parties recognized that there were conditions in the primary lease which, unless maintained, would terminate the leasehold estate. The primary lease was attached to disclose those terms and conditions. It is a complete non sequitur to conclude that because those conditions exist the sublessee is obligated to perform them. The trustee for the original lessors, in giving its consent to the sublease, clearly stated that it would expect all of the terms of the original lease to be performed by Coles irrespective of the agreement between the sublessor and the sublessee (Defendant's Exhibit B, R. 71, 73). Moreover, Spiegel and Coles agreed that should Coles become in default under the terms of its primary lease, Spiegel could cure the default and charge the cost and expense against rental due Coles (R. 78). Spiegel, therefore, had a vital interest in knowing just what the provisions, conditions and limitations of that primary lease were, and it was attached and made a part of the sublease for that reason.

Appellant points to the "nowithstanding" clause in the sublease as lending support to its contention that an obligation should be "construed" upon the subtenant. In doing so it elects to misinterpret the provisions of the

sublease and the overlease. For instance, it is argued that unless Spiegel thought itself bound to make structural repairs there was no reason to provide in a sublease that it should not be required to make them "notwithstanding anything in the overlease." The inference is that the overlease obligates the lessee to make structural repairs and that by this exception Spiegel is relieving itself from an obligation it had otherwise assumed. The fallacy is that there is nothing in the original lease requiring Coles to make structural repairs as such and therefore no obligation which Spiegel is required to protect itself against. The provision regarding structural repairs is in the sublease only. It obligates Coles to make all such, and provides that Spiegel shall maintain the building in good repair "except as to such structural repairs" (R. 17). Another example of this misconception of the distinction between a "condition" and a "covenant" is appellant's argument that a provision in the sublease requiring Coles to use its best efforts to persuade the owner to allow Spiegel to sublease, is proof of an assumption (Appellant's Brief, page 10). Appellant asserts that this provision plainly shows Spiegel considered itself bound by the overlease which prohibits subletting without the permission of the owner. The argument is completely fallacious. Spiegel was not bound by this provision in any sense that it was a covenant the performance of which it had "assumed". It was bound only in the sense that this was a condition or limitation on the estate, which if not complied with would terminate the tenancy just as a tenancy might be terminated by failure of Coles to pay rent. As a matter of fact, if the parties had considered Spiegel in any direct relationship with the original lessor,

contractual or otherwise, there would have been no occasion to provide that Coles should importune the original lessor for permission for Spiegel to sublet—Spiegel would have asked the original lessor for its consent directly. The provision would rather seem to make plain the fact that the parties recognize that the contract between the original lessor and Coles created one relationship and the contract between Coles and Spiegel created an entirely distinct and separate relationship. This, and the other provisions which are likewise misconstrued by appellant, simply demonstrate that the parties to the sublease intended to enter into their own agreement upon their own terms and in their own manner "notwithstanding any provisions of the overlease," except to recognize that the subtenancy was "subject to" or "subordinate to" or "limited by" the terms of the leasehold estate which they were dealing with. There is certainly nothing unusual, ambiguous or mysterious in that.

Appellant again, as a matter of "construction," refers to the testimony of Mr. Klein and ridicules his explanation for the differences which exist between the original lease and the sublease. As already pointed out, those differences are not all by any means "exceptions from the terms of the original lease." Several of the clauses are provisions which were apparently negotiated without reference to clauses of any similar kind in the primary lease. For instance, paragraph (e) with respect to eminent domain is an entirely different provision from anything in the primary lease and is simply a matter of negotiation. The same is true as to paragraph (d) with respect so Spiegel's

right to withhold rentals to apply on any indebtedness of the original lessee.

Nor is the construction which the parties have placed upon the instrument at variance with the position of the appellee. In the first place, the construction which parties place upon their contract has interpretive significance only where the language of the contract is doubtful or ambiguous. *Atlantic Refining Co. v. Wyoming National Bank,* 356 Pa. 226, 51 Atl. (2) 719 (1947). Here the contract is not ambiguous. Appellant, however, argues that since Coles had no further interest in the business it could want no further interest in the building and that the logical answer would be to have the new tenant assume the obligations of the lease, which it contends was done here. That is neither a logical answer nor was it in fact done. Coles did have a decided interest in the building because it owned a valuable leasehold. It was paying $1,850.00 per month rental and receiving $3,850.00 rental from its subtenant. If this subtenant defaulted, Coles would have a definite interest in renting to another subtenant on equally advantageous terms. Moreover, if Coles had desired or intended to step aside and put Spiegel in its place that would have been considerably easier than to have prepared a sublease. It would have been a simple routine matter to have assigned the lease with an express assumption of its obligations by the assignee. Not having been done, and both parties having been represented by counsel, one can only conclude that they did not desire such a result. It is true that Spiegel has made payment of certain items of the primary lease. Mr. Klein testified that those payments were made by the local store without benefit of a copy of the lease, and when the matter was first called

to the attention of the legal department the payments were stopped at once. There were, moreover, items in the primary lease which Spiegel did not pay. One was the primary rental and other was a provision obligating the original lessee to provide public liability insurance (R. 9). Appellant can surely not seriously contend that the voluntary payment of minor items in error can create an assumption of obligations not in fact undertaken. Evidence of such payments, in the light of the testimony and the plain language of the instrument, has no such probative force as asserted by the appellant.

If matters of the parties' construction are to be taken into account, attention should be directed to the fact that the parties agreed that in the event Coles should default in its obligations as lessee, Spiegel might cure the default and charge the expense thereof against rental due to Coles. If it was not recognized that Coles retained certain obligations there would be no reason for such provision.

From all the foregoing, it is submitted that the sublease is plain and unambiguous and contains no promise requiring Spiegel to perform the obligations of the original lessee; and that the words "subject to" have a well-defined meaning limiting the rights of the parties but creating no affirmative obligations. It is further submitted that since the lease is unambiguous, extrinsic evidence regarding intention or construction is inadmissible to vary its terms, but that even if such be considered, it only goes to further support the position of appellee, and the Honorable Trial Judge was correct in his conclusions.

II.

The Sublease Is Not an Assignment and Does Not Create an Obligation to Pay Taxes as a Matter of Law

The question as to whether an agreement constitutes an assignment or a sublease most frequently has arisen in a contest between the original lessor and the alleged lessee. The general rule developed from those cases undoubtedly is that where the entire reversionary estate is transferred, an assignment is created, but where any reversionary interest is retained, however small, a sublease is created.

51 C.J.S. 556;

Hobbs v. Cawley, 35 N.M. 413, 299 P. 1073 (1931);

Shreck v. Coates, 59 Ariz. 269, 126 P. (2d) 308 (1942);

Indian Ref. Co. v. Roberts, 97 Ind. App. 615, 181 N.E. 283 (1932).

Moreover, the authorities support the proposition that although an assignment may be created as far as the original lessor and the so-called assignee are concerned, the instrument may still retain its character as a sublease as between the sublessor and sublessee where the parties so intended.

Orr v. Neilly, 67 Fed. (2d) 423 (CCA 5th 1933);

Saling v. Flesch, 86 Mont. 106, 277 Pac. 612 (1929);

Hobbs v. Cawley, supra.

The Court in the case of *Indian Refining Co. v. Roberts, supra,* collects and reviews in a scholarly manner a great many of the decided authorities upon the question. That case is of particular value not only because of its careful and exhaustive discussion, but also because it is on the facts quite analogous to the present case. The owner

leased to one Donn Roberts. Roberts, in turn, leased to the appellant. There was no right of reentry reserved in this sublease by Roberts, but the appellant as sublessee had a right to terminate on ten days' notice. Moreover, the Court pointed out that the sublessor was given a right of entry by statute. There were also additional terms in the sublease. The Court held that the instrument was a sublease and not an assignment, saying at page 290 of the unofficial report:

> "It is to be noted that Donn M. Roberts held the premises in question for a 'term of three years, commencing November 1, 1929,' without any limitation or possibility of termination on his part whatever; that appellant took the premises from Donn M. Roberts for a term of 'three years from Nov. 1st, 1929,' retaining in itself the right to terminate by giving a specified notice. In other words, Donn M. Roberts held the premises for a term of years unlimited; appellant held the premises for a term of years with a 'special limitation.' Appellant might have occupied the premises for ten days, six months, or for the full three years. Under such circumstances, it cannot be said that appellant received all the interest in the term held by Donn M. Roberts, but it must be conceded that Donn M. Roberts retained some interest in the premises to himself. Under the authorities, supra, if the lessee, Donn M. Roberts, retained some interest, no matter how small, the transaction is thereby prevented from being an assignment, but is a sublease as between the original lessor, appellee herein, and the subsequent lessee, appellant herein. Donn M. Roberts not having parted with his entire interest in the term, but having retained an interest in such term, we hold the instrument in question to

be a sublease and not an assignment as between appellee and appellant. Appellant, therefore, is in no manner bound by the covenants in the original lease.

"Judgment reversed, with instructions to sustain appellant's motion for a new trial."

The Arizona Court appears to follow the rule announced in the majority of cases that where substantial rights are reserved to the original lessee, the instrument is a sublease and not an assignment. In that case the alleged sublessee took the property for the balance of the term, but the Arizona Court nevertheless held the transaction to constitute a sublease and not an assignment, saying at page 277 of the official report:

"An examination of the contract between Barnes and the lessees, we think clearly shows that the entire interest of the lessees in the original lease was not turned over to Barnes. This is very evident from the fact that the lessees retained the right to carry on operations to the amount of 21,000 yards a month. They reserved the right to reenter and take possession of the mines upon the failure of Barnes to perform the conditions of the original lease or his contract with them. They reserved some very substantial rights; for instance, the right to have the rental of 10% applied on the purchase price, the right to enter upon the workings of Barnes for the purpose of inspecting his work and keeping advised as to what he was doing and as to the condition of his operations."

The Supreme Court of the United States appears to follow the same rule that where the terms of the sublease are materially different, the instrument is not an assignment but is a sublease.

In the case of *United States v. Patrick J. Hickey,* 17 Wall. 9-14, 21 L. Ed. 559 (1873) Mr. Justice Hunt stated:

> "It is said that the transaction with Hickey was an assignment to him by the United States, and not an underletting. It was not an assignment, as the terms between the United States and Hickey were different from those between Eldridge and the United States. * * *"

It is, of course, apparent here that the terms and conditions between Coles and Spiegel are materially different both as to rental reserved and as to the other provisions of the document. Moreover, it is likewise clear that there is a definite reversionary interest retained by the sublessor. What is that reversionary interest? In the first place, it is a right of entry in the sublessor either for nonpayment of rent or for breach of any covenant in the sublease by the sublessee. The right of entry is contained in Section 27-1215 Ariz. Code Annot. 1939, providing as follows:

> "(a) Whenever a tenant shall neglect or refuse to pay his rent when due and in arrears for five (5) days, or whenever any tenant shall violate any of the provisions of his lease, the landlord or person to whom said rent is due, or his agent, may re-enter and take possession, or, without any formal demand or re-entry, commence an action for the recovery of the possession of said premises."

This is the same type of statutory right of entry mentioned by the Court in the case of *Indian Refining Co. v. Roberts, supra.* It would create a reversion in the sublessor in the event of nonpayment of rent or in the event Spiegel failed to maintain the building in good condition

and repair as in the sublease provided. Secondly, the sublessee has a right to cancel or terminate the sublease in the event the sublessor fails to restore, should a fire occur, or in the event of a taking by eminent domain. These rights also create reversionary interests of the same kind as set out in the *Indian Refining Company case* and many other cases cited in it. Finally, the terms and conditions are materially different within the rule set out in the Arizona case of *Shreck v. Coates, supra,* and the case of *United States v. Hickey, supra.*

That the parties intended the instrument in question to be a sublease, within the ruling of the cases cited herein, is conclusively shown by the following facts:

1. The parties negotiated for a sublease.

2. The original lessor gave its consent to a sublease and not to an assignment.

3. The instrument was designated as a sublease and referred to throughout as such.

4. When Mr. Klein, for Spiegel, later asked Mr. Shimmel representing Coles, to consent to an assignment in the event Coles defaulted in the primary lease, Mr. Shimmel responded:

> "But with reference to the agreement between Coles Trading Company and Spiegel, I see no basis for the former to agree to *assign* the lease to Spiegel. Such an assignment would have the effect of eliminating the sublease, and this, of course, *was never contemplated.*" (Emphasis ours)
>
> (Defendant's Exhibit F in evidence, R. 86)

5. The plaintiff's complaint in the District Court was filed upon an agreement designated as a sublease, and the complaint refers to a sublease throughout. In fact, proof

that the assignment theory is a complete afterthought is evidenced from the fact that an assignment is nowhere mentioned by the plaintiff in its pleadings, and the plaintiff did not even seek to amend to designate the instrument as "an assignment erroneously designated as a sublease" as it undoubtedly would have done had it considered the instrument as such.

Appellant cites the cases of *Marathon Oil Co. v. Lambert,* 103 S.W. (2d) 176 (Tex. Civ. App. 1937) and *Consolidated Coach Corp. v. Consolidated Realty Co.,* 251 Ky. 614, 65 S.W. (2d) 724 (1933) as holding that an assignment of the balance of the term creates an assignment and not a subtenancy. It is to be noted that both of those cases were actions between the original lessor and the alleged assignee or subtenant. As pointed out in the cases already referred to by appellee, those cases cited by appellant are not authority for a fact situation where the controversy is between the sublessor and sublessee.

Finally, having undertaken to prove that the instrument is an assignment, the appellant concludes that Spiegel, as assignee, is liable to pay the taxes because the covenant to pay taxes is one which runs with the land. In this connection, it is particularly interesting to refer the Court again to the agreement of December 10th between the parties (R. 78). In this agreement which supplements the lease and was amendatory thereto, Coles agreed that if it defaulted in its obligations under the lease Spiegel could cure any such default and the amount of that cost and expense would be immediately due and owing by Coles to Spiegel and Spiegel should have the right to deduct the cost from any rental due from Spiegel to Coles. An as-

signee may be responsible to his assignor in the case of a true assignment because the law implies a promise on the part of the assignee to perform certain covenants which touch and concern the land (see: 32 Am. Jur. par. 348, p. 306). As indicated in several of the cases cited by appellant (Appellant's Brief p. 21) the imposition of the obligation is ordinarily by way of subrogation—i.e. the assignor having paid, is subrogated to the right of the original lessor to enforce the payment from the assignee. The equitable doctrine of subrogation, however, is a doctrine that may be modified or extinguished by contract (see: *Northern Trust Co. v. Consolidated Elevator Co.* 142 Minn. 132, 171 N.W. 265 (1919)). Whether Spiegel is a sublessee or an assignee and whether the liability for taxes is asserted by "implication" or by "subrogation," it clearly appears that the parties have contracted to the contrary. Spiegel perceives no reason why this contract should not be valid.

The unreasonableness of the position which Coles has taken is demonstrated when its theory is carried to its ultimate conclusion. Taxes should be paid by Spiegel, appellant argues, because the obligation to pay taxes "runs with the land." But so does the obligation to pay rent! Will appellant next contend that Spiegel owes not only its approximate $4,000.00 per month rental to Coles under the sublease, but in addition the $1850.00 per month rental of Coles under the original lease? If Spiegel is obliged to pay Coles' taxes because they run with the land, why not Coles' rent in addition? The same argument applies to appellant's assumption theory. If Spiegel has "assumed" the obligation to pay taxes by virtue of all the mysterious abracadabra of appellant, has it also "as-

sumed'' the obligation to pay Coles' rental as reserved in the original lease? If such be the case, a monstrous burden has been ''construed'' upon Spiegel and Coles has relieved itself of its own obligations and obtained the advantage of a double rent. If ever a party should be estopped by its own conduct, Coles in this case should be estopped from now claiming that the instrument designated as a sublease is in fact an assignment. Spiegel has undertaken weighty and long-term obligations upon the representations and insistence of Coles that the parties were bound according to the terms of the instrument designated as a sublease and considered by all of the parties as a sublease. For Coles to be permitted now to change its position and assert the instrument to be an assignment, not only imposes gross inequities upon Spiegel, but could even jeopardize the tenancy which Spiegel requires in order to maintain its obligations.

CONCLUSION

Appellant concludes its brief with the apology that the arrangement it suggests may be inartistic but that artistry is not a prerequisite to legality. To say that the arrangement appellant suggests is inartistic is, to say the least, the last word in understatement. Appellant is desperately grasping at commas to torture the instrument into saying something it clearly does not; and to baldly assert it is an assignment after having insisted at great length throughout the negotiations and proceedings that it was a sublease should be a little embarrassing to anyone at all sensitive about honoring obligations.

Appellee believes the instrument is just what it says that it is and what the appellant—up to now—has insisted that it remain, to wit: a sublease; and that it creates no obligations beyond those set out in its plain terms.

WHEREFORE, Spiegel, Inc. respectfully urges this Honorable Court to affirm the judgment of the District Judge.

JENNINGS, STROUSS, SALMON & TRASK
OZELL M. TRASK
619 Title & Trust Building
Phoenix, Arizona
Attorneys for Appellee

No. 12,673

IN THE

United States Court of Appeals

For the Ninth Circuit

COLES TRADING COMPANY, a Corporation,
Appellant,

vs.

SPIEGEL, INC., a Corporation,
Appellee.

APPELLANT'S REPLY BRIEF

EVANS, HULL, KITCHEL & JENCKES
NORMAN S. HULL
807 Title & Trust Building
Phoenix, Arizona
Attorneys for Appellant

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

SUBJECT INDEX

	Page
Argument	1
I. Under the Contract Between the Parties, Spiegel Assumed the Obligation to Pay Excess Taxes	1
II. The Contract Constitutes an Assignment, and Places the Burden on Spiegel to Pay the Taxes, as a Matter of Law	4
A. Coles Did Not Retain Any Reversion	5
B. Spiegel's Argument That the Parties Intended an Assignment Is Fallacious	8
Conclusion	13

TABLE OF AUTHORITIES CITED

Cases Cited by Appellant

Pages

Cameron Tobin Baking Co. v. Tobin, 104 Minn. 333, 116 N.W. 838 (1908) 12, 13

Collins v. Dye, C.C.A. 9, 94 F.2d 799 (1938) 8

Kewanee Boiler Corp. v. American Laundry Mach. Co., 7 N.E.2d 461 11

Marathon Oil Co. v. Lambert, 103 S.W.2d 176 7

Ross v. Bumstead, 65 Ariz. 61, 173 P.2d 765 (1946) 8

Stewart v. Long Island R.R., 8 N.E. 200, 102 N.Y. 601 (1886) 10, 11

Towne v. Eisner, 245 U.S. 418, 62 L.Ed. 372 (1918) 1, 2

Weander v. Claussen Brewing Co., 42 Wash. 226, 84 Pac. 735 (1906) 12

Cases Cited by Appellee

Indian Refining Co. v. Roberts 5, 6, 7

Statutes

Section 27-1215, A.C.A. 1939 5

Section 71-105, A.C.A. 1939 6

Treatises

Restatement, Property, Section 154 7

No. 12,673

IN THE

United States Court of Appeals

For the Ninth Circuit

COLES TRADING COMPANY, a Corporation,
Appellant,

vs.

SPIEGEL, INC., a Corporation,
Appellee.

APPELLANT'S REPLY BRIEF

ARGUMENT

I. Under the Contract Between the Parties, Spiegel Assumed the Obligation to Pay Excess Taxes.

It may be true, as Spiegel contends in more than seven pages of argument, that the words "subject to," do not, when dissociated from their context or under certain circumstances, mean "assume," but, as Mr. Justice Holmes said in *Towne v. Eisner,* 245 U.S. 418, 62 L.Ed. 372 (1918):

". . . A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. . . ."

Here, the context of the contract, drafted by Spiegel*, and the performance of the contract by the parties, and even the testimony of Spiegel's attorney that, "we would except those things from the things that we took subject to," (R. 91, 92) clinches the argument of Coles that Spiegel assumed Coles' obligations under the lease:

(1) Spiegel and Coles annexed a photostatic copy of the lease to their contract, under a stipulation that the lease is *"a part hereof,"* (R. 17).

(2) Spiegel and Coles stipulated in their contract that *"notwithstanding"* anything in the lease governing such matters as the lessee's duties to make all necessary repairs and to perform promptly, the covenants of the parties on such matters in the contract should prevail, and they also stipulated for the termination of the contract on grounds different from those contained in the lease, (R. 17).

(3) Spiegel and Coles stipulated in their contract that Spiegel has thirty days of grace *"on matters other than rent,"* and this would be a meaningless covenant if Spiegel did not assume the lease obligations, (R. 17, 18).

(4) The transfer of the property by Coles to Spiegel under their contract was made *"subject to the terms of and with all the rights, privileges and benefits granted"* to Coles under the lease, (R. 17).

---

*Coles does not quarrel with Spiegel's version that neither Coles nor his lawyer was present when the contract was prepared, since this version is less favorable to Spiegel than is the account given in Coles' Opening Brief.

(5) The contract between Coles and Spiegel obligated Coles to seek permission from the property owner *"to the subletting or assigning"* by Spiegel, (R. 19).

(6) Spiegel expressly acknowledged and performed the obligations of the lease governing insurance and heating, (R. 91).

Spiegel argues that the provision in its contract with Coles imposing an obligation upon Coles, "notwithstanding" anything to the contrary in the lease, to make structural repairs, does not indicate any intention by Spiegel to assume the lease, because, (according to Spiegel, Br. 15), the lease does not require Coles to make "structural repairs." This argument ignores the language of the lease specifically imposing the obligation upon Coles to make *all* necessary repairs and replacements (R. 7):

> "The Lessee . . . hereby agrees to keep the same in repair and good tenantable condition, making such replacements as may be necessary during the term of this lease."

Spiegel's argument that the provision in its contract with Coles imposing an obligation upon Coles to seek permission from the property owners for Spiegel to sublet or assign, is only a limitation upon the estate and binding upon the estate only (Br. 15), is fallacious in at least two respects: *First:* The obligation could be regarded as a limitation upon the estate only if Spiegel is the *assignee* of the lease, as Coles maintains, and as Spiegel denies; *Second:* Under Spiegel's theory that there is neither privity of estate nor privity of contract between Spiegel and the owner, Spiegel would not be precluded from subletting or assigning, for there is nowhere any promise by Spiegel not

to do so. If Spiegel had not assumed this obligation, then the insertion of the clause in question would have been an idle gesture.

Spiegel denies that the construction placed upon the contract by the subsequent conduct of Spiegel and Coles amounts to an acknowledgment by Spiegel that it assumed Coles' obligations under the lease, because (according to Spiegel, Br. 17, 18) Spiegel did not pay for liability insurance, and did not pay Coles' rent to the owner. This argument is unwarranted and fallacious in that: *First:* There is nothing in the record to show who, if anyone, paid for such insurance; and, *Second:* It is obvious from the contract between Spiegel and Coles that Spiegel assumed only such covenants in the lease which are not covered by its contract with Coles.

Spiegel points to a subsequent agreement between the parties (R. 78), under which Spiegel undertook to cure any default by Coles under the lease, and apparently jumps to the conclusion that the later agreement was contemplated when the basic contract between Spiegel and Coles was drawn up, (Br. 14). Not only is such a conclusion wholly without foundation, but the later agreement is irrelevant here, where the controversy concerns the very question of what amounts to a default.

II. The Contract Constitutes an Assignment, and Places the Burden on Spiegel to Pay the Taxes, as a Matter of Law.

By ignoring the distinctions between rules of contract and property law, and by dwelling upon the literal designation of the contract between Spiegel and Coles, Spiegel assumes, as did its attorney who drew the instrument, that the contract is a "sublease," and not an assignment, and

then chides Coles for designating the contract as an "assignment" (Br. 27). To support such assumption, Spiegel contends that Coles retained a "reversion" in the land, and that, in any event (says Spiegel), the parties intended to enter into a "sublease," and such "intention" should prevail over the legal effect of the instrument.

A. COLES DID NOT RETAIN ANY REVERSION.

Spiegel concedes (Br. 19) that the distinction between a sublease and an assignment is that a reversionary interest is retained under a sublease, and argues that a "right of entry" is a reversionary interest, and such "right of entry" exists under Section 27-1215, A.C.A. 1939, because (says Spiegel) the statute expressly provides such a remedy. Spiegel intimates that such a statutory "right of entry" was treated as a reversionary interest by the Indiana Court, in *Indian Refining Co. v. Roberts* (Br. 22).

Were it to be assumed (contrary to the fact) that a right of entry constitutes a reversion, Section 27-1215 would not be pertinent here, unless it be further assumed that the contract in controversy is a "sublease," for the statute applies only where there is a "tenant," paying "rent," under the provisions of a "lease." In other words, if, as Coles maintains, the contract is an assignment, the statute could have no application. By citing it, Spiegel begs the question.

The Indiana Court, in *Indian Refining Co. v. Roberts,* was not dealing with the Arizona statute, nor even with a law similar to the Arizona statute, because the Indiana law concerned situations where, unlike the Arizona statute, a landlord and tenant relation did not exist. Furthermore, the Indiana Court disagreed with Spiegel's contention that

a "right of entry" constitutes a reversion and flatly held that it did not constitute a reversion:

> "The right of re-entry is not an estate or interest in land; it does not imply a reservation of a reversion; it is a mere chose in action, and, when enforced, the grantor is in through the breach of condition and not by the reverter; it exists only as an incident to an estate or interest for the protection for which it is reserved. We hold that the right of re-entry on the part of Donn M. Roberts for the non-payment of rent on the part of appellant was not such a retention of a reversionary interest as to prevent the instrument in question from being an assignment."

Spiegel also argues that, because Spiegel has the option to terminate the contract in the event that the store is destroyed by fire,* Coles possesses a reversionary interest in the property. This argument is unsound, because a right of election in the grantee of an estate is not a "residue of an estate left in the grantor," under the statutory definition of "reversion" in Arizona.

Section 71-105, A.C.A. 1939, which defines estates in expectancy, says that:

> "A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised."

Thus, a reversion is a future interest retained by the grantor by his act of transferring less than he owns to a grantee.

Unless Coles can be said to be the owner of a present interest in the property, he has no reversion, and the rela-

---

*Or in the event of eminent domain.

tion of landlord and tenant does not exist between Coles and Spiegel.

Coles transferred to Spiegel all of its interest in the leased premises, and incidental thereto, extended to Spiegel a bare contractual right to cease payment and to return the property upon the happening of a remote contingency —destruction by fire. Surely, it will not be held that, by conferring such a contractual right upon Spiegel, Coles retained an estate in the land. The leasehold estate cannot *revert* to Coles. The mere possibility that the leasehold estate can be *transferred* by Spiegel to Coles, does not even constitute a legal possibility of reverter. The situation is the same as though Coles had been the fee owner of the land, and had sold the land to Spiegel, under an agreement that if the store was destroyed by fire, Spiegel could, at Spiegel's election, sell the land back to Coles for the amount of the original purchase price. In this example, as under the contract here under discussion, Coles might have an *obligation* to retake the property, but he would have no *right* so to do, and having no such right, Coles has no reversion or other interest in the land.*

If this contract were a sublease, Coles would be required to pay the taxes on the leasehold estate because Coles would then be the owner of the leasehold estate. However, Coles has sold the leasehold estate to Spiegel, without retaining

---

*The *Indian Refining Co. case, ante*, cited by Spiegel is distinguishable, because there the assignee could terminate at any time, whereas Spiegel's right to terminate is subject to a condition precedent. A reversion is not subject to a condition precedent, *Restatement, Property*, Sec. 154. The instant case is similar to *Marathon Oil Co. v. Lambert*, 103 S.W.2d 176 (cited in appellant's opening brief, p. 18), where an instrument gave the so-called "sublessee" a contingent right to terminate, and the court held that the instrument was an assignment.

any ownership or interest therein. Spiegel is the owner of what was once Coles' estate and is bound to pay the taxes. This result flows, not from feudal technicalities, but from the consequences of rules of property law, based upon the ownership of land, clearly established during a period of five hundred years.

B. SPIEGEL'S ARGUMENT THAT THE PARTIES INTENDED AN ASSIGNMENT IS FALLACIOUS.

Spiegel argues that, even if there be no reversion in Coles, the contract must be treated as a sublease rather than an assignment, because the parties (says Spiegel) intended such result. This argument is replete with instances wherein the parties, and their lawyers, and others used the word "sublease" (as the contract is entitled) rather than the word "assignment."

This argument is worthy of consideration only if the law of Arizona makes an assignment purely a matter of intention, which it does not, because such result would constitute a clear departure from the common law. Arizona has adopted the common law as the rule of decision. *Collins v. Dye,* C.C.A. 9, 94 F.2d 799 (1938); *Ross v. Bumstead,* 65 Ariz. 61, 173 P.2d 765 (1946).

However, the contract itself demonstrates that the parties did not intend that Coles should retain any interest in the land; no right of re-entry was reserved for breach of covenant; Coles' sole remedy for nonpayment by Spiegel is an action for damages; no right was conferred upon Coles to terminate Spiegel's occupancy in the event of *any* contingency. Coles' rights are purely contractual rights, and are not property rights. The parties obviously intended that Coles would be Spiegel's creditor, and not

Spiegel's landlord. The mere fact that the parties are designated as "lessor" and "lessee" is less important than the fact that Coles surrendered complete dominion over the land.

Much reliance is placed by Spiegel upon a letter written by Coles' then attorney, but the letter, written several months after the transaction between Coles and Spiegel was closed, could not, and does not, show an intention to enter into a landlord-tenant relation. The attorney's only concern, as exhibited by his letter as a whole, was to prevent "rents" due to Coles from being eliminated by the later events. In other words, he was objecting to that type of an assignment which might authorize Spiegel to pay the lower rental directly to the landowner without paying any consideration to Coles for the transfer to Spiegel.

Spiegel's theory is extremely unusual, in that it comprehends that even though the contract is an assignment as to Coles, it is a sublease as to Spiegel: one transaction is broken down into two entirely different transactions, the effect of which depends upon which of the parties happens to bring the action—a sort of "double-faced" theory.

Ordinarily, legal relationships do not change with the party who looks at them. If A sells a chattel to B, and B sells it to C, the last two parties are seller and buyer as to A, as well as to B and C, and the last transaction is a sale "as to" all of them, and not a negotiable instrument or a false imprisonment.

But Spiegel contends that even though Coles has transferred away all its interest in the land, the relation of landlord and tenant may nevertheless exist between them. The question immediately arises, what land is Coles the

lord of? If, as seems clearly the case here, the owner of land transfers his entire interest to another, he can no more make himself a landlord than he can make himself an insurance company by merely calling himself one in the instrument of conveyance.

Because of its uniqueness, the origins of this "double-faced" approach may be worth looking into. Three cases are cited in Spiegel's brief as authority for the theory (Br. 19). Each relies almost entirely on what is the origin and foundation stone of the theory—dictum in the case of *Stewart v. Long Island R.R.*, 8 N.E. 200, 102 N.Y. 601 (1886). The plaintiff in that case had leased land to another for a term of fifty years and also contracted to sell the land to the lessee at the end of that time. The holder of the lease and contract to purchase then made a new lease to the defendant for a term of ninety-nine years. The plaintiff sued to recover the rent reserved in the original lease, and the defendant raised the objection that there was no privity of estate between them, on the ground that the latter instrument constituted a sublease. The court held that the agreement was an assignment despite the fact that it was intended to be a sublease. The principal issue was whether or not the equitable interest arising from the contract was a reversion sufficient to support a sublease. The majority of the court held that it was not such, and so the arrangement could not be a lease.

Only as a preliminary matter did the writer of the opinion in the New York case draw a distinction based upon whether the issue arose between the parties to the assignment or between the original lessor and the assignee (8 N.E. 201). It is upon these few sentences, completely un-

necessary to the decision, that all of Spiegel's citations are based.

There was a strong dissent in the *Stewart* case based principally on the ground that the equitable reversion was sufficient to support a sublease, but based also on the ground that intention should be allowed to control where it can possibly do so. It was the dissenter, therefore, who placed the greatest importance on the intention of the parties, not the majority.

Speaking of the difficulty of holding that the equitable title was not a reversion, that opinion contains this comment on the reservation of a "rent" in the assignment:

> "This difficulty is not answered by the cases which hold that, even where there is an assignment, the assignor may collect an excess of rent beyond what is due under the original lease, for such actions rest upon the express promise to pay, and not on an extinguished tenancy, and what is recovered is really not rent, but purchase price of the lease sold and assigned." (8 N.E. 211)

And referring specifically to the theory of the "double-faced" transaction, the opinion goes on to say:

> "Probably the doctrine referred to goes no further than, in case of an assignment, to preserve to the assignor some of his contract rights, but does not make him, at the same time a landlord and not a landlord." (8 N.E. 213)

It is precisely this that Spiegel is attempting to do. Since Coles has parted with all its interest in the land, the owner may treat Spiegel as its own tenant any time it should choose to do so. *Kewanee Boiler Corp. v. American Laundry Mach. Co.,* 7 N.E. 2d 461 (cited in appellant's opening brief,

p. 21). Under Spiegel's theory, Coles and the owner are each landlords of the same tenant and of the same tenancy. Spiegel contends that Coles has a right of entry for breach of covenant by virtue of the statute. The owner obviously has such a right by virtue of the assignment. Therefore, under Spiegel's theory, both would have a right to possession in the event of a breach by Spiegel—a highly confusing state of affairs. Coles respectfully submits that Spiegel has only one landlord, and that is the owner of the land.

The courts in some jurisdictions seem to have adopted the theory of the "double-faced" transaction without challenge, merely citing the *Stewart* case. Wherever any analysis was given to the matter, however, the courts have held otherwise: The theory was specifically rejected in *Weander v. Claussen Brewing Co.,* 42 Wash. 226, 84 Pac. 735 (1906) and in *Cameron Tobin Baking Co. v. Tobin,* 104 Minn. 333, 116 N.W. 838 (1908). In the latter case, as in the case at bar, the owner of land made a lease to the plaintiff. The plaintiff then "subleased" to the defendant for the remainder of the term, expressly reserving a right of entry for breach of any covenants. The defendant broke one of the covenants and the plaintiff brought an action of unlawful detainer. The court held for the defendant. By parting with all his interest in the land, the plaintiff became an assignor, and as such he could not enforce a right of entry, which exists only as an incident to a reversion. The plaintiff maintained that the existence of a landlord and tenant relation should be recognized despite the absence of a reversion, if the parties so intended, but this contention was rejected by the court:

> "Even if the question were de novo, with greatest difficulty only could the necessary conclusion from these premises be reconciled with general legal analo-

gies or with common sense. For, of necessity, on such a hypothesis, the right of entry would vest in two persons on breach of the covenant, viz., in the owner of the premises and in his lessee, who had assigned all his estate to the part of the premises involved. In consequence, the tenant in possession, on breach of covenant, would be subject at the same time, for the same wrong, in the same court, in the same form of action, to answer two different persons entitled to possession of the premises leased to him." (116 N.W. 840).

Spiegel's theory ignores the sound legal distinction between a lease and an assignment. It offers no solution to the problem of whether the instrument is a sublease or an assignment as to creditors of the parties, the government, or anyone beyond the parties thereto. Even as between the parties, it leaves the same question open until suit is instituted by one against the other, and then the solution turns upon which party first sues.

Spiegel's theory is tantamount to saying that when Smith and Jones stand side by side and watch an animal pass between them, the animal becomes a cat as to Jones, but as to Smith, it is an elephant. It is respectfully submitted that, in Arizona, a cat is a cat, an elephant is an elephant, a lease is a lease, and an assignment is an assignment.

CONCLUSION

For the reasons set out in this brief and in appellant's opening brief, Coles renews its request for entry of judgment in its behalf.

Respectfully submitted,

EVANS, HULL, KITCHEL & JENCKES
NORMAN S. HULL
807 Title & Trust Building
Phoenix, Arizona
Attorneys for Appellant

No. 12,673

IN THE

United States Court of Appeals

For the Ninth Circuit

COLES TRADING COMPANY, a corporation,
Appellant,

vs.

SPIEGEL, INC., a corporation,
Appellee.

Petition for Rehearing

EVANS, HULL, KITCHEL & JENCKES
NORMAN S. HULL
807 Title & Trust Building
Phoenix, Arizona
Attorneys for Appellant.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

TABLE OF AUTHORITIES CITED

	Page
Crone v. Amado, 214 P.2d 518, 69 Ariz. 389 (1950)	2
Davidson v. Minnesota Loan & Trust Co., 158 Minn. 411, 197 N.W. 833 (1924)	4
John W. Masury & Sons v. Bisbee Lumber Co., 68 P.2d 679, 49 Ariz. 443 (1937)	4
Porter v. French, 9 Ir. L. Rep. 514, 42 L.R.A. (NS) 1086	3
Sexton v. Chicago Storage Co., 129 Ill. 318, 21 N.E. 920 (1889)	4

No. 12,673

IN THE

United States Court of Appeals

For the Ninth Circuit

COLES TRADING COMPANY, a corporation,
Appellant,

vs.

SPIEGEL, INC., a corporation,
Appellee.

Petition for Rehearing

To the Honorable Judges of the Court of Appeals for the Ninth Circuit:

COMES Now appellant in the above-entitled cause, and presents this petition for a rehearing, and in support thereof, respectfully shows:

I.

In regard to the question of whether Spiegel intended to assume the obligations of the lease, petitioner respectfully urges Your Honors to reconsider the problem for the following reasons:

(a) The per curiam opinion indicates that Your Honors refused to consider extrinsic evidence offered by petitioner which shows that Spiegel, by its conduct and by its testimony at the trial, gave the agreement the same construction as now urged by petitioner. This refusal evidently arose from the rule that extrinsic evidence is not admissible to vary the terms of a written contract.

Petitioner respectfully urges that this holding requires Your Honors to assume the very conclusion here at issue—the meaning of the terms of the agreement; and wishes to call Your Honors' attention to the fact that no provision of the agreement is contradicted by this evidence, and that under such circumstances, Arizona law requires that it be considered. *Crone v. Amado,* 214 P.2d 518; 69 Ariz. 389 (1950).

Moreover, petitioner respectfully points out that Your Honors *did* consider, and did attach some importance to, extrinsic evidence offered by Spiegel against petitioner—the letter of your petitioner's former attorney.

(b) The opinion states that the exception by which Spiegel was relieved from the duty to make structural repairs fails to show that Spiegel would have been bound in the absence of such a provision. The provision is said to be immaterial because, it is said there was "no obligation which Spiegel was required to protect itself against." Petitioner wishes to point out that such a statement is con-

trary to the express provisions of the document in question and refers Your Honors to the last sentence on page seven of the Transcript of Record.

(c) The opinion indicates that Your Honors adopted the contention of Spiegel that the provisions excepted to were only limitations on the estate, and not positive obligations of Spiegel. In so doing, the opinion indicates that Your Honors may have overlooked the fact that the purchaser of an estate cannot make exceptions to the obligations connected with the estate unless they are his *own* obligations, since it is impossible to make exceptions to somebody else's obligations.

II.

On the question of which party should bear the risk for failing to insert a specific provision dealing with the taxes, the problem should depend upon whether, as a matter of law, the instrument was a sublease or an assignment. Petitioner respectfully urges that this question be given further consideration for the following reasons:

(a) The opinion indicates that Your Honors adopted the contention of Spiegel that the Arizona statute gives petitioner a right of re-entry. Petitioner respectfully points out that, since the Arizona statute applies only to *leases,* such a holding requires Your Honors to assume the very conclusion at issue—whether the instrument was a lease or an assignment. See *Porter v. French,* 9 Ir. L. Rep. 514, abstracted in 42 L.R.A. (NS) 1086.

(b) After assuming that a right of re-entry existed, the opinion indicates that Your Honors further assumed that by the law of Arizona a right of re-entry is a reversion. Petitioner respectfully urges that such an assumption is

without justification, since it is a clear departure from the common law, which cannot apply to a case arising under the law of Arizona, and refers Your Honors to the discussion in *Sexton v. Chicago Storage Co.,* 129 Ill. 318, 21 N.E. 920 (1889), cited in petitioner's opening brief, which shows that such a rule is violation of the common law, and also to the Restatement of Property, Sec. 154(a) and to *John W. Masury & Sons v. Bisbee Lumber Co.,* 49 Ariz. 443, 68 P.2d 679 (1937), wherein it was held that the common law as it existed at the time of the Revolution is the law of the State of Arizona.

(c) As authority for this proposition, the opinion cites only the case of *Davidson v. Minnesota Loan & Trust Co.,* 158 Minn. 411, 197 N.W. 833 (1924), but this case does *not* hold that a right of re-entry is a reversion, nor that a right of re-entry changes an assignment to a sublease, but holds only that an *expressly reserved right of re-entry* may be enforced despite the *absence* of a reversion.[1]

III.

If the extrinsic evidence offered by petitioner is considered, along with the documents themselves, the only conclusion that may reasonably be drawn is that Spiegel intended to assume, and did assume, all the obligations of the overlease which were not specifically mentioned in the sublease.

---

[1]Your petitioner apologizes for having failed to cite this case. In oral argument, Spiegel maintained that this case over-ruled one of the cases cited by your petitioner (Reply Br. 12). While it does not expressly do so, it clearly undermines the basis of the earlier decision. In Shepherd's citations, no indication is given that the later case has any adverse effect on the earlier one, and as a consequence, your petitioner had not read it.

There is no other reasonable inference, and under such circumstances, the findings of the trial court cannot be controlling.

Viewing it in a light most favorable to Spiegel, one can say no more of the transaction than this: that it is not clear from an examination of the documents which party was intended to pay for fire and boiler insurance, maintenance of the heating plant, and taxes. Petitioner readily concedes that specific provisions ought to have been inserted, but petitioner also urges that the absence of specific provisions does not mean that petitioner, rather than Spiegel, was intended to perform these obligations. Consequently, the extrinsic evidence offered by petitioner showing that Spiegel was intended to perform them, does not contradict the written agreement, but merely explains it. The references to the overlease which are contained in the agreement indicate, at the very least, that the parties intended the overlease to have some effect on their own contract. Under such circumstances, extrinsic evidence should be considered in deciding what that effect was.

When that evidence is considered, together with the two documents themselves, then the actions of the parties, both in the drawing of the contract and in acting under it, become consistent only with the interpretation that Spiegel assumed the obligations of the overlease.

Petitioner respectfully urges that if Your Honors will consider this evidence, it will become clear that there is only one reasonable way in which the history of this transaction might be reconstructed.

Petitioner was engaged in the furniture business. It entered into negotiations with Spiegel, Inc. to sell that

business, and, as a part of the transaction, to sell as well the right to occupy the building in which the business was carried on. To do that, petitioner could have made a short and simple assignment of its lease for a lump sum. Instead, and for undoubtedly sound financial reasons, it chose to make an arrangement in the form of sublease, under which it would receive more from Spiegel than it was required to pay to the owner—the difference constituting the inducement without which it would never have consented to make the sale.

To negotiate on the terms of the proposed instrument, petitioner's president and the president's son, neither of whom is an attorney, went to Chicago where they conferred with Spiegel's attorney, Mr. Klein, and with several officers of Spiegel. They had a copy of petitioner's lease before them. All persons then set out to draw up the sublease. They settled the preliminary terms and the rental provisions, and it was then agreed, in a general way, that the other obligations should be the same as those contained in petitioner's lease from the owner. Consequently, they decided to insert a provision in the proposed agreement that the overlease be attached to the sublease and made a part thereof.

But there were several provisions in the overlease which Spiegel did not want to include in its agreement with petitioner. Thus the provision: "It is expressly understood and agreed, however, that anything in said overlease to the contrary notwithstanding:"—and then follows a list of items different from any contained in the overlease.

Spiegel noticed that under the overlease the lessee was required to keep the premises in good condition and make

whatever replacements might be necessary. This was an obligation which Spiegel insisted be reduced, so it was agreed that, notwithstanding anything in the overlease to the contrary, petitioner would make any structural repairs which might be necessary, while Spiegel would be required to make only ordinary repairs.

Spiegel also did not wish to be bound by the provision in the overlease by which the lessee was required to pay the rent "promptly, and without demand," so it was decided that notwithstanding such provision, Spiegel should have a fifteen-day period of grace after the giving of notice before it should be in default for nonpayment of rent, and a thirty-day period of grace on the other obligations.

After studying the provisions in the petitioner's lease which deal with destruction by fire, Spiegel decided that it wanted a change there, too. Under the lease, if the building were destroyed, the lessor would have no duty to repair the building, unless there were about four years left to the term of the lease. If there were fewer years left, the obligations of both parties would terminate. Spiegel insisted upon a provision under which, notwithstanding the overlease, it alone would have the power to terminate, and under which petitioner would be required to rebuild in case of destruction, no matter when that destruction occurs.

The lease contains no provisions governing the parties' rights in case of eminent domain proceedings. It gives the lessee no right to terminate in any contingency except destruction by fire. Spiegel found this unsatisfactory and inserted a provision providing for abatement of rent if less than 25% of the premises were taken by eminent domain, and providing that if more than 25% were taken, Spiegel

should have a right to terminate, with no equivalent right in petitioner.

These provisions were inserted under the "notwithstanding" clause to indicate that the parties considered them as exceptions to the overlease. No exception was taken to the obligation in the overlease by which the lessee agrees to pay the cost of certain fire insurance, to pay for boiler explosion insurance, to pay half the cost of keeping up the heating plant, and to pay certain taxes.

After the conference at which these matters were discussed, petitioner's president and his son returned to Phoenix. Mr. Klein of Spiegel, Inc., then drew up the "sublease" in its final form and sent it to Phoenix for execution by petitioner. No changes in the instrument were made and it was executed exactly as drawn by Mr. Klein.

Everything went satisfactorily for more than four years. Spiegel paid the fire insurance, as the provision in the overlease required it to do. It also regularly paid for the boiler insurance and for the upkeep of the heating plant—matters covered in the overlease, but not mentioned in the "sublease." Spiegel acted as one who had intended to assume, and had assumed, obligations that originally rested on another.

But then in 1948, the taxes against the property exceeded the amount set down by the owner as the limit which he would pay. Petitioner was required to pay the difference to the owner under the lease, but thinking that Spiegel had assumed that obligation along with the others, petitioner requested payment from Spiegel. Then, for the first time, more than four years after the execution of the sublease, Spiegel claimed that it had not assumed any of the obliga-

tions of the overlease, and it repudiated its duty to pay the fire and boiler insurance and its share for maintenance of the heating plant.

Petitioner then brought this action against Spiegel to recover the amount paid. There was positive testimony by petitioner's president that the parties intended that the sublease should impose upon Spiegel the same obligations as contained in the overlease.

But the most telling testimony was that of Mr. Klein, Spiegel's attorney, and the man who drew the instrument. He was in agreement with the petitioner's president in referring to the above-mentioned provisions in the lease as being exceptions. But he differed with him on the question of what they were exceptions to. Petitioner's president thought they were exceptions to Spiegel's assumption of the overlease. Mr. Klein thought they were exceptions to "the things that we took subject to." This was an unusual way of phrasing the answer.

The ultimate question was, and is, which of the two parties here before the Court is bound to perform the obligations of the overlease. If, as petitioner contends, Spiegel is bound, then the whole transaction, and even the answer of Mr. Klein make sense. For in such context, when one makes exceptions, he makes exceptions to the assumption of obligations. But Mr. Klein, aware of a legalistic usage foreign to the general understanding of the layman, carefully inserted "the things that we took subject to." Yet, if petitioner's position is sound, even that makes sense, for it was no more than the, perhaps excusable, avoidance of an admission which would have immediately ended the case, and the substance of his answer was that he excepted these

things from the things that he assumed. The alternative is that petitioner, rather than Spiegel, is bound by the obligations. If that is true, then much of the transaction becomes difficult to understand, but more than that, Mr. Klein's answer becomes a meaningless mumbo jumbo. If Spiegel was assuming obligations, then it is understandable that he could make exceptions to them, but if it was not assuming them, and so they yet remained the obligations of petitioner, then his is a statement totally devoid of meaning—to say that he made exceptions to them. If they were not his obligations, he could not make exceptions to them. If they were not his principal's obligations, there would be neither need nor power to make exceptions to them.

If one man owed another a thousand dollars on a note, payable in one hundred dollar monthly installments, a stranger to the transaction could not make an exception to that obligation by which only fifty dollars should be due. Spiegel's position makes no more sense than that.

At two points in this case the phrase "subject to" has arisen—in the sublease, itself, and in Mr. Klein's testimony. If it is construed as meaning "obligated by," then the whole transaction becomes immediately clear, both because of the express terms of the document and because of Mr. Klein's testimony. If it is held to mean "limited by," as Spiegel contends, then both the exceptions in the instrument and the testimony of Mr. Klein become confusing verbiage.

Without question, the great majority of the cases have held that "subject to" did not impose an affirmative obligation. But they did *not* hold that the phrase can *never* impose such an obligation. In the construction of a written contract, the meaning that controls is the meaning under-

stood by men in general, and not that voiced by legal grammarians subsequently. A glance at this heading in "Words and Phrases" reveals how often litigants have been required to take their cases to court for a judicial determination. The force of *stare decisis* has been greater than the accepted usage of language by those whose rights the rule was intended to protect. (I put it to Your Honors whether the writers of the Bible meant "limited by" when it was written that Jesus went down into Nazareth with his parents and was subject to them, or when it was written, "Servants, be subject to your masters".)

If Spiegel assumed the obligations, then the transaction makes sense. If Spiegel did not assume them, it makes no sense.

When Mr. Klein testified "I said that we would except those things from the things that we took subject to," he must have meant what all the parties concerned had intended, viz.: "I said that we would except those things from the things that we assumed."

If Spiegel can advance, or Your Honors discover, a single other reasonable interpretation of that statement by the author of the contract, petitioner will concede that it is not entitled to judgment.

IV.

The welfare of petitioner for many years to come will be vitally affected by the opinion in this case, for since it constitutes a judicial determination of the nature of the transaction, petitioner will be required to expend large sums each year during the life of the lease, not only for taxes, but also for other lease expenses heretofore paid by Spiegel, and petitioner urges the Court that the cause is deserving

of Your Honors' closest scrutiny, and beseeches Your Honors to re-read the opinion filed in the case and to re-read the briefs filed by the parties, and then if Your Honors should think it desirable, to allow further oral argument.

WHEREFORE, it is respectfully urged that this petition for a rehearing be granted and that the judgment be, upon further consideration, reversed.

Respectfully submitted,

EVANS, HULL, KITCHEL & JENCKES
and
NORMAN S. HULL
807 Title & Trust Building
Phoenix, Arizona
Attorneys for Coles Trading Co., Appellant.

CERTIFICATE OF COUNSEL

I, NORMAN S. HULL, counsel for the above-named appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay and that I believe it to be well-founded.

NORMAN S. HULL

No. 12675

United States
Court of Appeals
for the Ninth Circuit.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,

Appellant,

vs.

LUTHER C. HESS and ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Appellees.

Transcript of Record

Appeal from the District Court for the Territory of Alaska Fourth Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12675

United States
Court of Appeals
for the Ninth Circuit.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,

Appellant,

vs.

LUTHER C. HESS and ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Appellees.

Transcript of Record

Appeal from the District Court
for the Territory of Alaska
Fourth Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Affidavit of Defendant M. P. Mullaney..... 31

Amended Answer of Defendant M. P. Mullaney to Complaint in Intervention..... 43

Amended Answer of Defendant M. P. Mullaney to Plaintiff's Complaint..... 38

Amended Judgment and Decree..... 89

Appeal:

Designation of Portions of Record and Proceedings to Be Included in the Record on 155

Notice of 88

Appellant's Statement of Points and Designation of Parts of Record to Be Printed..... 167

Attorneys of Record 1

Certificate of Clerk 165

Certificate of Court Reporter..... 164

Complaint for Injunction and Other Relief.... 2

Complaint in Intervention 18

INDEX PAGE

Designation of Portions of Record and Proceedings to Be Included in the Record on Appeal 155

Exhibit, Defendant's:

No. 1A—Deposition of James C. Ryan Together With Defendant's Exhibit No. 1 Attached Thereto. 138

Exhibit, Intervenor's:

No. 1—Deposition of J. A. Williams.... 124

Exhibits, Plaintiff's and Intervenor's:

No. 4—Affidavit of Luther C. Hess..... 133

10—Affidavit of E. A. Tonseth..... 136

13—Affidavit of Roy P. Mathias..... 137

Findings of Fact and Conclusions of Law.... 72

Conclusions of Law 84

Findings of Fact..... 74

Notice of Appeal 88

Opinion 49

Order Permitting Intervention 30

Preliminary Injunction 33

Statement of Points to Be Relied on by Appellant 151

INDEX PAGE

Stipulation Re Introduction of Evidence at Trial 35

Stipulation Re Printing of Record..... 157

Stipulation Re Reporter's Transcript of Evidence 122

Stipulation Re Summary of Evidence..... 92

Transcript of Record 158

Witnesses:

Hess, Luther C..... 161

Liese, William K. 162

ATTORNEYS OF RECORD

H. L. FAULKNER,
Juneau, Alaska,
Attorney for Plaintiff.

MEDLEY & HAUGLAND,
1011 American Bldg.,
Seattle, Wash.,
Attorneys for Plaintiff.

COLLINS & CLASBY,
Fairbanks, Alaska,
Attorneys for Plaintiff.

FAULKNER, BANFIELD & BOOCHEVER,
Juneau, Alaska,
Attorneys for Intervenor.

J. GERALD WILLIAMS,
Attorney General of Alaska.

JOHN H. DIMOND,
Juneau, Alaska,
Asst. Attorney General,
Attorneys for Defendants M. P. Mullaney, Tax Commissioner and William Liese, Tax Assessor.

MIKE STEPOVICH,
Fairbanks, Alaska,
Attorney for Defendant, City of Fairbanks.

MAURICE T. JOHNSON,
Fairbanks, Alaska,
Attorney for Defendants, Fairbanks School District and Its Directors L. F. Joy, Frank Conway, A. F. Coble and Frank P. DeWree.

In the District Court for the Territory of Alaska,
Fourth Judicial Division

LUTHER C. HESS,

Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska, et al.,

Defendant.

ALASKA JUNEAU GOLD MINING CO., a Corporation,

Intervenor.

No. 6352

COMPLAINT FOR INJUNCTION AND OTHER RELIEF

Plaintiff complains and alleges and prays as follows:

I.

That plaintiff is a resident and inhabitant of the Territory of Alaska, Fourth Judicial Division, residing at Fairbanks, Alaska, and he has been such resident and inhabitant for more than twenty-five years.

II.

That defendant, M. P. Mullaney, is the duly constituted and acting Commissioner of Taxation of the Territory of Alaska, and he has been such Commissioner of Taxation at all times mentioned herein,

and he is charged by law with the duty of collecting taxes for the Territory of Alaska, including such taxes as may be levied on real and personal property, and he resides at Juneau, Alaska, and has deputies and agents in each of the four judicial divisions, including the Fourth Judicial Division, and he is being sued herein on account of acts already committed and which he intends and threatens to perform under color of law in his official capacity as Commissioner of Taxation of the Territory of Alaska is accordance with the provisions of the act of the Alaska Legislature referred to in Paragraph III hereof. That the defendant, City of Fairbanks, is a municipal corporation organized under the laws of Alaska, and it is situated in the Fourth Judicial Division of Alaska; and the Fairbanks School District is an independent school district organized under the laws of the territory, and it [1*] comprises the City of Fairbanks and certain adjacent territory, and it performs its functions by and through the above-named directors, who are named as defendants herein; and that defendant William Liese is the Tax Assessor for the Fourth Judicial Division, Alaska, appointed pursuant to the provisions of the Alaska Property Tax Act.

III.

This action arises under the act of the legislature of Alaska passed and approved February 21, 1949, and designated as Chapter 10, Session Laws of Alaska, 1949, and known and cited as the "Alaska Property Tax Act," and the amendment thereto

*** Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

designated Chapter 88, Session Laws of Alaska, 1949.

IV.

That the Alaska Property Tax Act hereinabove mentioned purports to levy a tax on all real property and improvements and tangible personal property within the Territory of Alaska, with certain exceptions therein named, at the rate of 1% per annum of the true and full value thereof, excepting that the taxable value of unimproved, unpatented mining claims which are not producing and non-producing patented mining claims is fixed at $500.00 per each 20 acres or fraction of each such claim regardless of true value; and the tax on boats and vessels engaged in marine service on a commercial basis levied under Section 3 of the Alaska Property Tax Act as amended by Chapter 88 is optional and may be paid on the true and full value or at the rate of $4.00 per net ton of the vessel's registered tonnage with a minimum tax fixed at $20.00; and this tax is purported to be levied by Section 3 of the Alaska Property Tax Act for the calendar year 1949 and each calendar year thereafter. [2]

V.

That plaintiff is the owner of certain property within the city of Fairbanks, Alaska, consisting of Lot 7 in Block 60 and a cabin thereon, which lot is assessed for tax purposes at $700.00 and the cabin at $300.00; and he is the owner of certain real property situated in the Fairbanks School District, consisting

of two patented non-producing mining claims on St. Patrick Creek, being named Discovery Claim and No. 1 Above Discovery, and also of a one-third interest in the Gold Engine Bench Claim of approximately 40 acres, which is non-producing and of other real property in the Fairbanks School District valued at $5,000.00; and also of certain groups of patented and unpatented mining claims in the Fourth Judicial Division, Territory of Alaska, not included within the City of Fairbanks or within the Fairbanks School District and all valued according to the standard of valuation set up in Section 3 of the Alaska Property Tax Act at $50,713.46; and is also the owner of certain personal property, consisting of machinery and equipment, tools, etc., in the Fourth Judicial Division of Alaska outside the boundaries of the City of Fairbanks and outside the boundaries of the Fairbanks School District valued at $7,500.00 according to the standard of valuation set up in Section 3 of the Alaska Property Tax Law.

VI.

That Section 44 of the Alaska Property Tax Act, Chapter 10 of the Session Laws of Alaska, 1949, provides that the defendant Tax Commissioner shall be the collector of taxes levied under the Alaska Property Tax Act on all property outside the incorporated cities, school districts, and public utility districts in the [3] territory; and he is authorized and empowered to enforce the collection of such taxes levied under that act; and acting under the authority

given him by the act, he has prescribed forms for making tax returns and promulgated and published rules and regulations for the assessment and collection of all taxes imposed under the provisions of said act as amended.

VII.

That under the provisions of the Alaska Property Tax Act the municipal corporations in the Territory of Alaska are authorized, empowered, and directed to assess, levy, and collect and enforce the collection of the taxes on all property prescribed in Section 3 of the Alaska Property Tax Act within the municipalities, and the manner of assessment, collection, and enforcement of the taxes provided to be levied under the provisions of the Alaska Property Tax Act is that provided by the city ordinances and resolutions of the municipalities with reference to levy, assessment, and collection of municipal taxes; and the Alaska Property Tax Act provides that the portion of the Alaska property tax collected by municipal corporations, including the defendant City of Fairbanks, which is not in excess of the combined municipal taxes authorized by existing law and the territorial tax of 10 mills levied under the Alaska Property Tax Act shall be retained by the cities, including the City of Fairbanks.

VIII.

That the taxes provided to be collected under the Alaska Property Tax Act in independent school districts outside of town bounds are levied, assessed,

and collected in accordance with the ordinances and resolutions of the directors of the independent [4] school districts, and the Alaska Property Tax Act imposed the duty of levying, assessing, and collecting the taxes in the independent school districts, including the Fairbanks School District, upon the directors of the school district, and the whole thereof may, under the law, be used by the school district for school purposes.

IX.

That pursuant to the provisions of Section 44, Chapter 10 of the Session Laws of Alaska, 1949, the defendant Tax Commissioner prescribed certain forms for statement of assessable real and personal property under the provisions of the Alaska Property Tax Act, and he delivered certain of those forms to the plaintiff with instructions to make a list of all of plaintiff's real and personal property in the Territory of Alaska outside the independent school districts and incorporated cities and to place a valuation thereon in accordance with the provisions of the Alaska Property Tax Act, and upon receipt of the forms the plaintiff, within the time prescribed by law and the regulations of the defendant Tax Commissioner prepared and filed his returns, which contain a list of all the real and personal property aforesaid, and plaintiff, before filing the returns, inserted thereon the following:

> "This return is made without prejudice or waiver of rights to contest the validity of Chapter 10, Session Laws of Alaska, 1949, or any assessment made or tax levied thereunder."

X.

That pursuant to the provisions of the Alaska Property Tax Act and the municipal ordinances of the city of Fairbanks, Alaska, the defendant City of Fairbanks assessed, levied and [5] collected from plaintiff the tax of 10 mills on plaintiff's property within the limits of the city of Fairbanks, Alaska, and an additional tax of 10 mills, making a total of 20 mills, all of which is to be used for municipal purposes pursuant to the provisions of the Alaska Property Tax Act.

XI.

That under the provisions of the Alaska Property Tax Act the defendant Fairbanks School District and the hereinabove named defendants who are directors of the Fairbanks School District levied and assessed the tax of 10 mills on plaintiff's property hereinabove described which is situated within the Fairbanks School District, and the whole of this tax will be collected and retained by the Fairbanks School District for school purposes pursuant to the provisions of the Alaska Property Tax Act.

XII.

That defendant Tax Commissioner is threatening to levy and collect a tax from plaintiff on the real and personal property described in the returns aforesaid according to the standards of valuation prescribed by the Alaska Property Tax Act, and he is asserting the taxes to be a lien upon the real and personal property of the plaintiff listed, described

and set forth in plaintiff's returns, which lien is a cloud upon the title of plaintiff's real and personal property, and defendant M. P. Mullaney, Tax Commissioner, will, unless enjoined by this court, enforce the collection of the tax on both the real and personal property of the plaintiff, which tax, based on the value set forth in the returns, will be $580.13 [6]

XIII.

That all the taxes levied and assessed, including those which plaintiff has already paid the City of Fairbanks and those which the defendants are threatening to collect, including those which are a lien on plaintiff's property and constitute a cloud upon the title thereof, are for the calendar year 1949, and the defendants are threatening to and will, unless enjoined by this court, levy and assess and collect, through the means provided by law, similar taxes on plaintiff's several parcels of property in all future years; and all the taxes paid by plaintiff to the City of Fairbanks under the Alaska Property Tax Act have been paid only because plaintiff has no alternative under the ordinances of the City of Fairbanks, in accordance with which the taxes were collected, and they were paid under duress and for the reason that the laws of the territory and the ordinances of the city make no provision for the payment of those taxes under protest or for enjoining the collection of those already paid for the calendar year 1949, and the same is true of school districts and public utility districts.

XIV.

That the Alaska Property Tax Act provides for the creation and establishment of a Board of Assessment and Equalization in each judicial division of the Territory of Alaska, which shall consist of three members appointed by the governor, and they are empowered to appoint an appraiser and assessor in each judicial division, and they have appointed an appraiser and assessor in the Fourth Judicial Division of the Territory of Alaska; and the law further provides that the assessor in each judicial division shall prepare an annual assessment roll showing, among other things, the assessed value, quantity or amount of the property of each property owner in the judicial division outside of incorporated towns and school districts and the amount of taxes thereon; and that the assessment roll shall be completed for the year 1949 on or before the first day of September, and that it shall be certified as required by law; but notwithstanding this provision of the law, no assessment rolls have been made for the respective judicial divisions of the territory.

XV.

Plaintiff alleges that the taxes imposed upon him by the Alaska Property Tax Act and which the defendant is threatening to collect and which are a cloud upon the title of plaintiff's real and personal property are invalid for the following reasons:

1. The act is in violation of the provisions of Section 9 of the Organic Act of Alaska and amendments

thereto in that the levy and assessment thereunder and the taxes imposed thereby are not uniform upon the same class of subjects.

2. That the Alaska Property Tax Act is violative of the Constitution of the United States and the Fifth and Fourteenth Amendments thereto and of the Civil Rights Act (8 USCA 41) and of the Act of Congress of July 30, 1886 (24 Stat. 170).

3. That the territorial tax levied and assessed under the provisions of the Alaska Property Tax Act within incorporated cities, public utility districts, and school districts is levied, assessed, and collected at different times and in a different manner and on different valuations from the tax provided to be levied, assessed, and collected outside of incorporated cities, school districts, and public utility districts.

4. That the rate of taxation within municipalities and [8] outside municipalities and within school districts and outside school districts is different for the reason that in most all taxing units, except that administered by the Territorial Tax Commissioner direct, provision is made for discount for cash, while no provision is made for any discount in the taxing units administered by the Tax Commissioner, and this results in a different rate of tax within the different taxing units, and in most of the municipalities and school districts of the territory provision is made under the law and the ordinances and resolutions of its taxing units that taxes are due and payable on a certain date within the municipality or

independent school district, with the provision that if one half of the tax is paid on that date, the remainder may be deferred for a period of 6 months.

5. That there is no uniformity of assessment and valuation among the four judicial divisions, as the law provides for a separate Board of Assessment and Equalization in each judicial division with no overall or common Board of Assessment or Equalization to equalize values of property between one judicial division and another, and there is no provision for appeal to a central, general or overall board.

6. The portion of the tax provided to be collected by municipalities, school districts and public utility districts is to be collected and disposed of by the several municipalities, school and public utility districts where collected and to be used solely for their own purposes and not for any territorial purpose, so that the tax provided for is a general territorial tax only on that property which is situated outside incorporated cities, school districts and public utility districts, although [9] the property owners and inhabitants of the municipalities, school and public utility districts obtain the same benefit from the taxes provided to be levied outside those districts, as do the inhabitants and property owners who are required to pay the tax outside cities, school districts and public utility districts.

7. That the terms and provisions of the Alaska Property Tax Act as amended are vague, uncertain, indefinite and impossible of reconciliation, and some

of the terms of Chapter 10 and of Chapter 88 of the Session Laws of Alaska, 1949, are inconsistent with each other; and they are in conflict with the ninth subdivision of Sec. 16-1-35 ACLA-1949 as amended by Ch. 38, Session Laws of Alaska, 1949.

8. The dates for assessment, valuation, returns, payment and attachment of liens vary as between the several taxing units created by the act, thereby destroying the uniformity of the tax.

9. There is a different and discriminatory criterion for valuation of mining property and boats as distinguished from other property.

10. There are different and substantial variations as to exemptions between the different types of taxing districts.

11. There is no method provided in the Alaska Property Tax Act nor in any other law of the territory for equalization of assessments as between different municipalities or taxing units or between any of these and outside areas or between the outside areas in the several judicial divisions.

12. There are substantial differences in the personal liability of taxpayers, depending upon the taxing unit in which [10] their property is situated, and there are substantial differences in the penalties and in the charges to which different taxpayers are liable, depending upon whether their property is within a municipality, a school district, a public utility district, or without those districts.

13. There are substantial differences as to the rights of redemption provided for in the lien enforcement provisions applicable to different taxing units.

14. There are inconsistent provisions within the Alaska Property Tax Act itself.

15. There are substantial variations in the exemptions allowed under Section 6 of the act, and particularly with reference to exemptions under Sub-divisions (f), (g) and (h) of the said Section 6.

XVI.

Plaintiff is threatened with an immediate, substantial and irreparable injury for which he has no adequate remedy at law, and the provisions of Chapter 10, Session Laws of Alaska, 1949, constitute a cloud on the title of plaintiff's property and subject him to the payment of a tax on both real and personal property with interest thereon for failure to pay and to the danger of a levy upon his personal property for the payment of the tax levied therein and demanded to be paid.

There are no provisions in the Alaska laws which constitute a clear and certain remedy by way of recovery of taxes imposed under the provisions of Chapter 10, Session Laws of Alaska, 1949, because there is no provision for repayment of the taxes thereunder with interest, which may be paid under protest, and if taxes should be paid under protest, plaintiff [11] will be unable to recover them or have them refunded to him by the territory, because at

the present time the Territory of Alaska is insolvent and unable to pay its ordinary expenses of government, and even if such a remedy were provided by law, it would be completely inadequate.

That there is no provision of the Alaska Property Tax Act which permits payment of the territorial tax imposed on property within a municipality or school district under protest and no provision in the law for its recovery in the event the territorial tax act is held to be invalid.

XVII.

That the granting of injunctive relief herein is also necessary to prevent a multiplicity of suits against defendant Tax Commissioner and the Territory of Alaska to recover taxes imposed by the provisions of Chapter 10, Session Laws of Alaska, 1949, for every property owner in the territory is in the same situation as plaintiff, and if taxes are paid and the law is thereafter held to be invalid, each owner of property will be required to bring a separate action for the recovery of the taxes so paid; and if plaintiff pays taxes levied in the future on his property in the other two taxing units, namely, the City of Fairbanks and the Fairbanks School District, under protest, he will be obliged to allow these taxing units to levy the tax and proceed in court to enforce the lien on plaintiff's property provided by the ordinances and resolutions of the City of Fairbanks and the Fairbanks School District; and the procedure provided for the enforcement of collection of taxes

in each taxing unit is different, and in order to obtain relief on the grounds and for the reasons hereinabove set forth, the plaintiff [12] would be required to file a multiplicity of suits and to follow in court the separate procedures provided for the different taxing units.

Wherefore, plaintiff prays:

1. That process issue against the defendants to answer this Complaint.

2. That after notice and hearing this court grant to plaintiff a Preliminary Injunction restraining the defendants from doing any act or thing for the purpose of collecting from plaintiff the tax imposed by the Alaska Property Tax Act, Chapter 10 of the Session Laws of 1949, as amended by Chapter 88 of the Session Laws of Alaska, 1949, during the pendency of this suit.

3. That the defendants, pending the final hearing in this cause, be enjoined and restrained by Preliminary Injunction from doing any act or thing which would place a cloud upon the title of plaintiff's property hereinabove mentioned and from assessing, levying or collecting or attempting to levy, assess or collect any tax on plaintiff's property under the provisions of the Alaska Property Tax Act.

4. That upon final hearing this court enter a final order and decree permanently enjoining the defendants and each of them from performing any of the acts mentioned hereinabove.

5. That upon final hearing this court enter an

order, adjudging and decreeing Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88 of the Session Laws of Alaska, 1949, to be null and void and of no legal force or effect.

6. That the plaintiff be granted such other and further relief as the court deems meet. [13]

/s/ LUTHER C. HESS,
Plaintiff.

/s/ H. L. FAULKNER,
MEDLEY & HAUGLAND,

/s/ CHAS. J. CLASBY,
Attorneys for Plaintiff.

State of Washington,
County of King—ss.

I, the undersigned, Luther C. Hess, being first duly sworn, depose and say that I am the plaintiff hereinabove named, that I have read the foregoing Complaint and know its contents, and that the facts stated therein are true and correct as I verily believe.

/s/ LUTHER C. HESS.

Subscribed and sworn to before me this 26th day of November, 1949.

[Seal] /s/ EDWARD F. MEDLEY,
Notary Public and and for the State of Washington,
County of King. Residing at Seattle.

My commission expires 9/18/51.

[Endorsed]: Filed December 2, 1949. [14]

[Title of District Court and Cause.]

COMPLAINT IN INTERVENTION

Comes now the above-named intervenor and petitioner, by leave of court, and represents, complains and alleges as follows:

I.

That the above-entitled cause is pending in the above-entitled court, and it is brought for the purpose of testing the validity of the Alaska Property Tax Act, Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88 of the Session Laws of Alaska, 1949, and plaintiff in his complaint alleges the act is unconstitutional and void.

II.

That the above-named intervenor is a corporation organized and existing under the laws of West Virginia, and it has complied with all the laws of Alaska relating to corporations doing business in the Territory of Alaska. It has paid all corporation license taxes due the Territory, filed all reports required by law, and is doing business in Alaska; and it was engaged in lode mining in the Territory of Alaska from 1915 continuously until 1944 when economic conditions forced it to cease its mining operations temporarily.

III.

That the intervenor is interested in the above-entitled cause and in the outcome thereof for the reasons hereinafter set forth, and intervenor's complaint sets up questions of law and fact in common with plaintiff's claim. Intervenor's intervention will not delay or prejudice the adjudication of the rights of plaintiff or defendants or either of them, but it will enable all [15] parties to more fully present to the court all the issues of law involved in this cause.

IV.

That intervenor is the owner of both real and personal property in the Territory of Alaska, First Judicial Division, and in five different taxing units thereof, as such are defined and designated in Chapter 10, Session Laws of Alaska, 1949; namely, in the City of Junea, the Juneau Independent School District, the Douglas Independent School District, the City of Douglas, and in territory not included in any municipality or school district or other taxing unit. That the property consists of patented and unpatented mining claims, milling plant, buildings, foundry, machine shop and carpenter shop, wharves, power plants, transmission lines, dams, oil tanks, machinery, supplies, equipment, mill sites, and other real property in addition to the mining claims, all described and valued in the different taxing records of the five separate taxing units as follows:

Taxing Unit	Description of Property	Assessment	Net Tax
City of Douglas	Transmission lines	$ 2,500	$ 35.75
Douglas Independent School District	19 mining claims	9,500	
	Houses	3,370	
	240 power plant	100,000	
	Foundry, etc.	10,000	
		$ 122,870	1,204.13
City of Juneau	Cars and trucks	1,850	36.26
	Pole lines	5,600	
	Wharf and equipment	10,000	
	Warehouse and shed	3,000	
	Dormitory	2,000	
	Supplies	40,000	1,187.76
	Lot 6, Bl. 119	500	9.80
	Lot 5, Bl. 27	800	
	House	10,846	
	Personal	1,000	247.86
	Lot 7, Bl. 5	5,000	98.00
		$ 80,596	$1,579.68
Juneau Independent School District	Land	49,000	
	Buildings, Transmission lines	109,000	
	Perseverance mining claims	11,500	
	Salmon Creek plant	1,518,220	
	Nugget Creek plant	25,000	
	Sheep Creek plant	295,430	
	9 claims (Sheep Creek)	900	
	Building	570	19,694.28
		$2,009,620	

Taxing Unit	Description of Property	Assessment	Net Tax
	Boats and watercraft		291.00
Territory of Alaska	Annex plant and equipment	50,000	
	Annex Creek line	4,000	
	Annex residences (3)	3,000	
		$ 57,000	
	Personal exemption	200	
	Return filed for .....$	56,800	

Wrangell District:
Red Cliff Lode 0.603 acres
16 patented claims 218.081 acres

Juneau District:
10 claims patented 180.014 acres
Total acres 398,698
Assessment $10,000
Return filed for

That the taxes levied on all the property of intervenor within the City of Douglas, the Douglas Independent School District, the City of Juneau, and the Juneau Independent School District have been paid in full for the current year, and that the tax rate in the City of Douglas is 15 mills with 2% discount for cash payment in full, and that the tax rate in the City of Juneau is 20 mills less 2% discount for payment in cash in full, and that the tax rate in the Juneau Independent School District is 10 mills less 2% for payment in full in cash. The ordinances of the City of Douglas and the City of Juneau and the resolutions of the Juneau and Douglas Independent School Districts provide [17] that taxes for the current year may be paid in two equal installments at the full rate or in cash at the discount hereinabove mentioned.

V.

Intervenor re-alleges and adopts by reference as a part of this complaint in intervention all the allegations contained in Paragraphs II, III, IV, VI, VII, VIII, and XIV of plaintiff's complaint and alleges that the Board of Assessment and Equalization was created and established for the First Judicial Division, Territory of Alaska, the same as that created and established for the Fourth Judicial Division and that in the First Judicial Division the Board has appointed an appraiser and assessor.

VI.

Intervenor re-alleges and adopts by reference as a part of this complaint in intervention the allegations of Paragraph IX of plaintiff's complaint and alleges that the same procedure was followed with reference to plaintiff in intervention's real and personal property in the First Judicial Division as that described in Paragraph IX of plaintiff's complaint with reference to his property in the Fourth Judicial Division and that, in making the returns to the Tax Assessor in the First Judicial Division, the plaintiff in intervention inserted thereon a statement to the effect that the return was made without prejudice or waiver of the rights of plaintiff in intervention to contest the validity of Chapter 10, Session Laws of Alaska, 1949, or any assessment made or tax levied thereunder.

VII.

That pursuant to the provisions of the Alaska Property Tax Act and the municipal ordinances of the City of Juneau, [18] Alaska, the City of Juneau assessed, levied and collected from plaintiff in intervention the tax of 10 mills on the property of plaintiff in intervention within the limits of the City of Juneau, Alaska, and an additional tax of 10 mills, making a total of 20 mills, all of which is to be used for municipal purposes pursuant to the provisions of the Alaska Property Tax Act, and the discounts allowed for the payment of this total tax of 20 mills in cash as hereinabove alleged were allowed upon the whole 20-mill levy, and the City of Douglas, pursuant to the provisions of the Alaska Property Tax Act and the municipal ordinances of that city, assessed, levied and collected from plaintiff in intervention a tax of 10 mills on the property of plaintiff in intervention within the corporate limits of the City of Douglas and an additional 5 mills, making a total of 15 mills, all of which is to be used for municipal purposes by the City of Douglas pursuant to the provisions of the Alaska Property Tax Act, and the discounts for payment in full were allowed upon the entire tax of 15 mills.

VIII.

That under the provisions of the Alaska Property Tax Act the Juneau Independent School District and the Douglas Independent School District levied and assessed the tax of 10 mills on all real and personal property of plaintiff in intervention herein-

above described which is situated within the Juneau and Douglas Independent School Districts, and the whole of this tax has been collected and retained by the Douglas and Juneau Independent School Districts for school purposes pursuant to the provisions of the Alaska Property Tax Act, and the discounts for payment in cash were allowed as hereinabove alleged. [19]

IX.

That defendant Tax Commissioner is threatening to levy and collect a tax from plaintiff in intervention on the real and personal property of plaintiff in intervention within the Territory of Alaska outside the municipalities and independent school districts hereinabove mentioned and which real and personal property is described in the aforesaid returns, according to the standards of valuation prescribed by the Alaska Property Tax Act, and he is asserting the taxes to be a lien upon the real and personal property of the plaintiff in intervention, which property is listed, described and set forth in plaintiff in intervention's returns, which lien is a cloud upon the title of the real and personal property of plaintiff in intervention; and defendant M. P. Mullaney, Tax Commissioner, will, unless enjoined by this court, enforce the collection of the tax on both the real and personal property of plaintiff in intervention, which tax, based on the value set forth in the returns of plaintiff in intervention, will be $668.00.

X.

That all the taxes levied and assessed, including those which plaintiff in intervention has already paid the Cities of Juneau and Douglas and the Juneau and Douglas Independent School Districts and those which the defendant Tax Commissioner is threatening to collect, including those which are a lien on the property of plaintiff in intervention and constitute a cloud upon the title thereof, are for the calendar year 1949, and defendant M. P. Mullaney, Commissioner of Taxation for the Territory of Alaska, is threatening to and will, unless enjoined by this court, levy and assess and collect, through the means [20] provided by law and otherwise, similar taxes on valuations to be hereafter determined on all the property of plaintiff in intervention in all future years; and all the taxes paid by plaintiff in intervention to the Cities of Juneau and Douglas and to the Juneau and Douglas Independent School Districts, under the Alaska Property Tax Act, have been paid only because plaintiff in intervention had no alternative under the ordinances of the Cities of Juneau and Douglas and the resolutions and ordinances of the Juneau and Douglas Independent School Districts, in accordance with which these taxes were collected, and they were paid under duress and for the reason that the laws of the Territory and the ordinances of the Cities of Juneau and Douglas and the ordinances and resolutions of the Juneau and Douglas Independent School Districts make no provision for the payment of those taxes under protest or for enjoining the collection

of those already paid for the calendar year 1949, and no provision is made by law or the ordinances for the return of taxes levied, assessed and paid to municipalities and independent school districts in the Territory of Alaska.

XI.

Plaintiff in intervention re-alleges and adopts by reference, as a part of this complaint in intervention, all of the allegations contained in Paragraph XV of plaintiff's complaint filed herein; and alleges that the taxes imposed upon plaintiff in intervention by the Alaska Property Tax Act and which the defendant M. P. Mullaney, Commissioner of Taxation, is threatening to collect and which are a cloud upon the title of the real and personal property of plaintiff in intervention are invalid for the reasons set forth in Paragraph XV of [21] plaintiff's complaint, which is adopted as a part of this complaint in intervention.

XII.

Plaintiff in intervention re-alleges all the allegations contained in Paragraph XVI of plaintiff's complaint and adopts the same by reference as though fully set forth herein and alleges plaintiff in intervention is in the same situation and threatened with the same injuries as alleged by plaintiff in Paragraph XVI of his complaint with reference to himself, and that all of the allegations of Paragraph XVI of plaintiff's complaint apply with equal force to plaintiff in intervention.

XIII.

That the granting of injunctive relief herein is also necessary to prevent a multiplicity of suits against defendant Tax Commissioner and the Territory of Alaska and the different taxing units thereof to recover taxes imposed by the provisions of Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, for every property owner in the Territory is in the same situation as plaintiff; and if taxes are paid and the law is thereafter held to be invalid, each owner of property will be required to bring a separate action for the recovery of taxes so paid; and if plaintiff pays taxes levied in the future on its property within the City of Juneau and the City of Douglas, Alaska, and the Juneau and Douglas Independent School Districts, under protest, it will be obliged to allow these taxing units to levy the tax and proceed in court to enforce lien on the property of plaintiff in intervention, as provided by the ordinances and resolutions of the Cities of Juneau and Douglas and the Juneau and [22] Douglas Independent School Districts; and the procedure provided for the enforcement or collection of taxes in each taxing unit is different, the rate is different, and in order to obtain relief on the grounds and for the reasons hereinabove set forth, plaintiff in intervention would be required to file a multiplicity of suits and to follow in court the separate procedures provided for the different taxing units.

Wherefore, intervenor prays as follows:

1. That it may be permitted to intervene in this action under the provisions of the laws of Alaska and the rules of civil procedure, and that it may present to the court in this action the facts and evidence in support of this complaint in intervention and introduce such evidence and file such briefs and make such arguments as are proper and in support of the questions of fact hereinabove alleged and in support of the questions of law and fact which are common to plaintiff and intervenor and proceed as though plaintiff in intervention were a party plaintiff in the above-entitled cause.

2. That the prayer of plaintiff's complaint be granted.

3. That the defendant M. P. Mullaney, Commissioner of taxation of the Territory of Alaska, pending the final hearing in this cause, be enjoined and restrained by preliminary injunction from doing any act or thing which would place a cloud upon the title of the property of plaintiff in intervention hereinabove described and from assessing, levying or collecting, or attempting to levy, assess or collect, any tax on the property of plaintiff within the Territory of Alaska under the provisions of the Alaska Property Tax Act.

4. That upon final hearing the court enter a final order [23] and decree permanently enjoining the defendant M. P. Mullaney, Commissioner of Taxation, and all of his deputies, assistants, and

employees, and each of them, from performing any of the acts mentioned hereinabove.

5. That upon final hearing this court enter an order adjudging and decreeing Chapter 10 of the Session Laws of Alaska, 1949, as amended by Chapter 88 of the Session Laws of Alaska, 1949, to be null and void and of no legal force or effect.

6. That plaintiff in intervention be granted such other and further relief as the court deems meet.

ALASKA JUNEAU GOLD
MINING COMPANY,
A Corporation,

By /s/ E. G. NELSON,
Plaintiff in Intervention.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ H. L. FAULKNER,
Attorneys for Intervenor.

Territory of Alaska,
First Judicial Division—ss.

I, the undersigned, being first duly sworn, depose and say that I am the Assistant Manager of the above-named Alaska Juneau Gold Mining Company, a corporation, and at present in charge of all of its property and business in the Territory of Alaska, and I am authorized to make this verification; that I have read the foregoing complaint in intervention, and that the facts stated therein are true and correct as I verily believe.

/s/ E. G. NELSON.

Subscribed and sworn to before me this 9th day of [24] January, 1950.

[Seal] /s/ N. C. BANFIELD,
Notary Public for Alaska.

My Commission expires Aug. 21, 1950.

Receipt of Copy acknowledged.

[Endorsed:] Filed January 13, 1950. [25]

[Title of District Court and Cause.]

ORDER PERMITTING INTERVENTION

Upon reading and filing the motion of the above-named intervenor, and also upon inspection of the complaint in intervention attached to the motion of plaintiff in intervention,

It Is Hereby Ordered that the above-named Alaska Juneau Gold Mining Company, a corporation, which is named as intervenor, be and it is hereby permitted to intervene in the above-entitled cause and to file herein its complaint in intervention and such motions as it deems necessary and advisable and to proceed in this cause as intervenor, pursuant to the provisions of law and the rules of civil procedure applicable.

Done in open court this 13th day of January, 1950.

/s/ HARRY E. PRATT,
Judge.

Entered Jan. 13, 1950.

[Endorsed]: Filed January 13, 1950. [26]

[Title of District Court and Cause.]

AFFIDAVIT OF DEFENDANT M. P. MULLANEY, COMMISSIONER OF TAXATION

United States of America,
Territory of Alaska—ss.

I, M. P. Mullaney, being first duly sworn, depose and say:

(1) That I am the Commissioner of Taxation for the Territory of Alaska and as such am charged by law with the duty of enforcing the tax laws of the Territory, and I have been made collector of the taxes levied under Ch. 10 S.L.A. 1949.

(2) That since April 28, 1949, at which time the District Court for the First Judicial Division at Juneau, Alaska, issued a preliminary injunction in the case of Alaska Steamship Company v. Mullaney restraining me from collecting amounts withheld by the plaintiff in that case from the wages and salaries of its employees as a tax under the Alaska Net Income Tax Act, which injunction as modified on July 9, 1949, so as to include only the amounts withheld from wages and salary of plaintiff's seagoing personnel is still in effect as of the date of the signing of this affidavit, it has been my experience as Commissioner of Taxation for the Territory of Alaska that the existence of said preliminary injunction has had the effect of causing many taxpayers and withholding agents under the Alaska Income Tax Act to refuse to pay to the Territory

amounts withheld under the said Act. According to the records of my office, approximately 40 companies and associations that are withholding agents under the said Act have withheld amounts from the wages and salaries of their [98] employees totalling aproximately $145,000 for the first three quarters of 1949, have made returns to me as Tax Commissioner of this amount, but have refused to remit said sums to the Territory of Alaska. Each of said 40 withholding agents in making the returns as aforesaid have given as reasons for not remitting the amounts withheld that the Alaska Income Tax Act had been challenged by other withholding agents and that injunctions had been issued by federal courts in the State of Washington and the Territory of Alaska. None of the said withholding agents have obtained an injunction restraining the collection from them of the amounts withheld as aforesaid.

Therefore, based upon the foregoing facts, it is my opinion that the issuance of a preliminary injunction in the above-entitled action will have the effect of causing many taxpayers other than the plaintiff to refuse to pay property taxes levied under Ch. 10 S.L.A. 1949, which will result in financial distress for the Territory of Alaska and will cause unnecessary delay in the payment of the Territory's obligations.

/s/ M. P. MULLANEY.

Subscribed and sworn to before me this 24th day of January, 1950.

[Seal] /s/ MARTHA WENDLING,
Notary Public for Alaska.

My Commission expires: 11-1-50.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 27, 1950. [99]

[Title of District Court and Cause.]

PRELIMINARY INJUNCTION

This matter, having come on before the Court upon the complaint of plaintiff and the complaint in intervention of the intervenor above named and upon affidavits in support of the complaints, and upon argument of counsel of the respective parties, all on the 28th day of January, 1950, and the Court having made and filed herein its Findings of Fact and Conclusions of Law; now on application of plaintiff and intervenor and based upon the Findings and Conclusions,

It Is Hereby Ordered that the defendant M. P. Mullaney, Commissioner of Taxation for the Territory of Alaska, and his agents, officers and employees are hereby enjoined and restrained, during the pendency of the above-entitled cause and until final determination thereof by the Court, from collecting from plaintiff or from the intervenor the tax imposed by the Alaska Property Tax Act, Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, upon

property owned by them in the Territory outside of any municipality, school district or public utility district; and from attempting to make collection thereof and from applying or attempting to apply the provisions of Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, to the plaintiff or to the intervenor.

It Is Further Ordered that this preliminary injunction shall become effective and be in full force and effect during the pendency of the above-entitled cause and until final determination thereof, upon plaintiff's filing herein his bond [36] with sufficient sureties to the defendant for the benefit of whom it may concern in the sum of $1,000.00 to be approved by the Court or the clerk thereof, and conditioned to pay to the defendant, M. P. Mullaney, Commissioner of Taxation, for the benefit of whom it may concern all damages which he may sustain if this preliminary injunction is wrongfully issued or issued without sufficient cause and upon the further condition that the intervenor furnish a similar bond in the penal sum of $1,000.00 conditioned in like manner.

This Preliminary Injunction is issued upon the Findings and Conclusions heretofore filed herein by the Court and for the reason that it appears from the complaints of plaintiff and intervenor that serious constitutional questions arise on the pleadings in this cause which cannot be determined until final hearing, and that pending the final hearing the plaintiff and intervenor are threatened with the

application to them of the provisions of Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, and that plaintiff and intervenor have no adequate remedy at law pending the final determination of this cause.

Done in open Court this 30th day of January, 1950.

/s/ HARRY E. PRATT,
Judge.

Entered Jan. 30, 1950.

[Endorsed]: Filed January 30, 1950. [37]

[Title of District Court and Cause.]

STIPULATION RE INTRODUCTION OF EVIDENCE AT TRIAL

It Is Hereby Stipulated and Agreed by and between Faulkner, Banfield & Boochever, Collins & Clasby, and Edward F. Medley, attorneys for plaintiff and intervener, and J. Gerald Williams, Attorney General of Alaska, attorney for defendants, that upon the trial of the above-entitled cause, there may be introduced in evidence by either side, all the affidavits, certified copies of ordinances, resolutions, minutes of meeting and other material which was used at the hearing on the application for preliminary injunction, with the same force and effect as though the matters contained in these documents were presented by witnesses in open court, and that all affidavits, certified copies and other

documents introduced by both sides on the application for the preliminary injunction, may be considered by the Court at the trial of the above-entitled cause, including affidavits of Luther C. Hess, Mrs. Daniel B. Livie, C. L. Popejoy, Celia E. Wellington, A. J. Balog, E. A. Tonseth, Frank Conway, and M. P. Mullaney; certified copy of Ordinance No. 329 of the City of Juneau; certified copy of Ordinance No. 2 of Juneau Independent School District; certified copy of extract of Minutes of Special Meeting of Board of Directors of Juneau Independent School District held August 19, 1949, certified copy of Ordinance No. 2 of Douglas Independent School District; certified copy of extract from Minutes of Meeting of Board of Directors of Douglas Independent School District held October 5, 1949; certified copy of Ordinance No. 9 of the City of Douglas, Alaska; certified copy of extract of Minutes of Meeting of the Douglas City Council held September 12, 1949; certified copy of Ordinance No. 384, City of Fairbanks, Alaska; certified copy of Resolution of Common Council [39] of the City of Fairbanks, held September 26, 1949; certified copy of extract of Minutes of Meeting of Fairbanks City Council dated September 27, 1949; certified copy of Resolution of Common Council of the City of Fairbanks dated October 10, 1949; certified copy of Resolution of Directors of Fairbanks School District dated October 10, 1947; certified copy of Resolution of Fairbanks School District dated August 18, 1949; and received with the same force and

effect as though presented by testimony of witnesses in open court, subject to all objections which may be interposed as to competency, relevancy and materiality.

It Is Further Stipulated that any further evidence deemed necessary by either side may also be presented at the time of the trial of the above-entitled cause, in the manner prescribed by law and the rules of the Court.

Dated at Juneau, Alaska, the 31st day of January, 1950.

/s/ H. L. FAULKNER,

/s/ CHAS. J. CLASBY,

/s/ EDWARD F. MEDLEY,
Attorneys for Plaintiff
and Intervener.

/s/ J. GERALD WILLIAMS,
Attorney for Defendant,
M. P. Mullaney.

/s/ MIKE STEPOVICH,
Attorney for City of Fairbanks, Alaska, a Municipal Corporation.

/s/ MAURICE T. JOHNSON,
Attorney for Defendant Fairbanks School District, an Independent School District, and L. F. Joy, Frank Conway, A. F. Coble and Frank P. DeWree, Directors of Fairbanks School District, an Independent School District Corporation.

[Endorsed]: Filed February 6, 1950. [40]

[Title of District Court and Cause.]

AMENDED ANSWER OF DEFENDANT M. P. MULLANEY TO PLAINTIFF'S COMPLAINT

Defendant M. P. Mullaney, by his attorneys, after leave of court first had and obtained, files this his amended answer to the plaintiff's complaint on file herein, answering as follows, to wit:

First Defense

(1) Answering Paragraph I of the Complaint, defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

(2) Answering Paragraph II of the Complaint, defendant admits the allegations contained therein.

(3) Answering Paragraph III of the Complaint, defendant admits the allegations contained therein.

(4) Answering Paragraph IV of the Complaint, defendant admits all material allegations contained therein with the exception of the allegation to the effect that the taxable value of non-producing patented mining claims is fixed at $500.00 per each 20 acres or fraction of each such claim. Defendant denies said allegation for the reason that the Alaska Property Tax Act provides that the assessed value of only those non-producing patented mining claims upon which the improvements originally required for patent have become useless through deterioration, removal or otherwise is to be fixed at $500.00 per each 20 acres or fraction of each such claim.

(5) Answering Paragraph V of the Complaint, defendant [27] alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

(6) Answering Paragraph VI of the Complaint, defendant admits that Section 44 of the Alaska Property Tax Act, Chapter 10 of the Session Laws of Alaska, 1949, provides that the defendant shall be the collector of taxes levied under the Alaska Property Tax Act, but defendant denies the qualification placed upon said Section 44 by plaintiff in said Paragraph VI of his Complaint and which is contained in the following words, to wit: "on all property outside the incorporated cities, school districts, and public utility districts in the Territory." Defendant admits the remaining material allegations contained in said Paragraph VI.

(7) Answering Paragraph VII of the Complaint, defendant admits that under the provisions of the Alaska Property Tax Act, the municipal corporations in the Territory of Alaska are authorized to assess, collect and enforce the taxes on all property described in Section 3 of the Alaska Property Tax Act within municipalities, and that the assessment, collection and enforcement of said taxes shall be in the manner prescribed by the property tax law of the municipality; but defendant denies each and every other material allegation contained in said Paragraph VII.

(8) Answering Paragraph VIII of the Complaint, defendant admits all the material allegations contained therein.

(9) Answering Paragraph IX of the Complaint, defendant admits all the material allegations contained therein.

(10) Answering Paragraph X of the Complaint, defendant [28] alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

(11) Answering Paragraph XI of the Complaint, defendant alleges that he without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

(12) Answering Paragraph XII of the Complaint, defendant admits that he intends to collect a tax from plaintiff on the real and personal property described in the returns aforesaid according to the standards of valuation prescribed by the Alaska Property Tax Act, that he will enforce the collection of said tax and that said tax, based on the value set forth in the returns, amounts to $580.13; but defendant denies each and every other material allegation contained in said Paragraph XII.

(13) Answering Paragraph XIII of the Complaint, defendant admits that the taxes which have been levied and assessed and which defendant intends to collect from plaintiff are for the calendar year 1949; but defendant denies each and every other material allegation contained in said Paragraph XIII.

(14) Answering Paragraph XIV of the Complaint, defendant admits all material allegations contained therein with the exception of the allegation that "no assessment rolls have been made for the respective judicial divisions of the Territory," which allegation defendant denies.

(15) Answering Paragraph XV of the Complaint, defendant denies each and every material allegation contained therein.

(16) Answering Paragraph XVI of the Complaint, defendant denies each and every material allegation contained therein. [29]

(17) Answering Paragraph XVII of the Complaint, defendant denies each and every material allegation contained therein.

Second Defense

For a second and separate defense, defendant alleges that the classification contained in Ch. 10 S.L.A. 1949 between (a) property within incorporated cities and towns, incorporated school districts, and independent school districts, and (b) property outside of such areas, is reasonable and valid and does not violate standards of uniformity and equality for the reason that under territorial laws the public schools within areas designated above as (a) receive only approximately two-thirds support from territorial funds, while the schools in areas designated above as (b) receive 100% support from territorial funds.

Wherefore, defendant M. P. Mullaney, having

fully answered the complaint of plaintiff filed herein, prays for a judgment and decree declaring Ch. 10 S.L.A. 1949 to be valid in its entirety, and for an order dismissing said complaint.

/s/ J. GERALD WILLIAMS,
Attorney General of Alaska.

/s/ JOHN H. DIMOND,
Assistant Attorney General, Attorneys for Defendant, M. P. Mullaney.

United States of America,
Territory of Alaska—ss.

John H. Dimond, being first duly sworn on oath, deposes and says: that I am one of the attorneys for the defendant M. P. Mullaney in the above-entitled action, and make this affidavit of verification for and on behalf of said defendant [30] for the reason that he is not now at Juneau, Alaska, nor within 100 miles thereof, the place where this affidavit is made; that I have read the foregoing Amended Answer, know the contents thereof and that the same is true as I verily believe.

/s/ JOHN H. DIMOND.

Subscribed and sworn to before me this 3rd day of May, 1950.

[Seal] /s/ MARTHA WENDLING,
Notary Public for Alaska.

My Commission expires November 1, 1950.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 8, 1950. [31]

[Title of District Court and Cause.]

AMENDED ANSWER OF DEFENDANT M. P. MULLANEY TO COMPLAINT IN INTERVENTION

Defendant M. P. Mullaney, by his attorneys, after leave of court first had and obtained, files this his amended answer to the complaint in intervention on file herein, answering as follows, to wit:

First Defense

(1) Answering Paragraph I of the Complaint in Intervention, defendant admits the allegations contained therein.

(2) Answering Paragraph II of the Complaint in Intervention, defendant admits all material allegations contained therein.

(3) Answering Paragraph III of the Complaint in Intervention, defendant admits all material allegations contained therein.

(4) Answering Paragraph IV of the Complaint in Intervention, defendant admits all material allegations contained therein with the exception of the allegation that the tax rate in the Juneau Independent School District is 7 mills, and defendant alleges that the tax rate in said district is 10 mills.

(5) Answering Paragraph V of the Complaint in Intervention, defendant re-alleges and adopts by reference as part of this amended answer, all of Paragraphs (2), (3), (4), (6), (7), (8) and (14)

of defendant's amended answer to the complaint of plaintiff Luther C. Hess on file herein. Defendant admits the allegation that the Board of Assessment and Equalization was created and established for the First Judicial [32] Division, Territory of Alaska, the same as that created and established for Judicial Division the Board has appointed an appraiser and assessor.

(6) Answering Paragraph VI of the Complaint in Intervention, defendant admits all the material allegations contained therein.

(7) Answering Paragraph VII of the Complaint in Intervention, defendant admits all the material allegations contained therein.

(8) Answering Paragraph VIII of the Complaint in Intervention, defendant admits all material allegations contained therein with the exception of the allegation that the whole of the tax of 10 mills collected by the Juneau Independent School District was retained by it, and defendant alleges that a portion of said tax was paid to the Commissioner of Taxation for the Territory of Alaska.

(9) Answering Paragraph IX of the Complaint in Intervention, defendant admits that he intends to collect a tax from plaintiff in intervention on its real and personal property within the Territory of Alaska outside the municipalities and independent school districts and which real and personal property is described in the returns aforesaid, ac-

cording to the standards of valuation prescribed by the Alaska Property Tax Act, that he will enforce the collection of said tax and that said tax, based on the values set forth in said returns, amounts to $668.00; but defendant denies each and every other material allegation contained in said Paragraph IX.

(10) Answering Paragraph X of the Complaint in [33] Intervention, defendant admits that the taxes which have been levied and assessed and which defendant intends to collect from plaintiff in intervention are for the calendar year 1949; but defendant denies each and every other material allegation contained in said Paragraph X.

(11) Answering Paragraph XI of the Complaint in Intervention, defendant denies each and every material allegation contained therein.

(12) Answering Paragraph XII of the Complaint in Intervention, defendant denies each and every material allegation contained therein.

(13) Answering Paragraph XIII of the Complaint in Intervention, defendant denies each and every material allegation contained therein.

Second Defense

For a second and separate defense, defendant alleges that the classification contained in Ch. 10 S.L.A. 1949 between (a) property within incorporated cities and towns, incorporated school districts, and independent school districts, and (b) property outside of such areas, is reasonable and

valid and does not violate standards of uniformity and equality for the reason that under territorial laws the public schools within areas designated above as (a) receive only approximately two-thirds support from territorial funds, while the schools in areas designated above as (b) receive 100% support from territorial funds.

Wherefore, defendant M. P. Mullaney, having fully answered the complaint in intervention filed herein, prays for a judgment and decree declaring Ch. 10 S.L.A. 1949 to be valid in [34] its entirety, and for an order dismissing said complaint in intervention.

/s/ J. GERALD WILLIAMS,
Attorney General of Alaska.

/s/ JOHN H. DIMOND,
Assistant Attorney General, Attorneys for Defendant, M. P. Mullaney.

United States of America,
Territory of Alaska—ss.

John H. Dimond, being first duly sworn on oath, deposes and says; that I am one of the attorneys for the defendant M. P. Mullaney in the above-entitled action, and make this affidavit of verification for and on behalf of said defendant for the reason that he is not now at Juneau, Alaska, nor within 100 miles thereof, the place where this affidavit is made; that I have read the foregoing Amended Answer,

know the contents thereof and that the same is true as I verily believe.

/s/ JOHN H. DIMOND.

Subscribed and sworn to before me this 3rd day of May, 1950.

[Seal] /s/ MARTHA WENDLING,
Notary Public for Alaska.

My Commission expires November 1, 1950.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 8, 1950. [35]

In the District Court for the Territory of Alaska,
Fourth Judicial Division
No. 6352

LUTHER C. HESS,

Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska, et al.,

Defendants.

ALASKA JUNEAU GOLD MINING CO., a Corporation,

Intervenor.

H. L. FAULKNER,
Of Juneau, Alaska,
Attorney for Plaintiff.

MEDLEY & HAUGLAND,
1011 American Bldg.,
Seattle, Washington,
Attorneys for Plaintiff.

COLLINS & CLASBY,
Of Fairbanks, Alaska,
Attorneys for Plaintiff.

FAULKNER BANFIELD & BOOCHEVER,
Of Juneau, Alaska,
Attorneys for Intervenor.

J. GERALD WILLIAMS,
Attorney General of Alaska,
Juneau, Alaska,
Attorney for Defendants M. P. Mullaney, Tax Commissioner and William Liese, Tax Assessor.

MIKE STEPOVICH,
Of Fairbanks, Alaska,
Attorney for Defendant, City of Fairbanks.

MAURICE T. JOHNSON,
Of Fairbanks, Alaska,
Attorney for Defendants, Fairbanks School District and Its Directors L. F. Joy, Frank Conway, A. F. Coble and Frank P. DeWree.

OPINION

The Organic Act of Alaska approved August 24, 1912, as amended by act of June 3, 1948, T 48, section 78 USCA, Supp., 48-1-1 ACLA, 62 Stat. 302, will hereinafter be referred to as the Organic Act; Chapter 10 of the Session Laws of Alaska 1949 will hereinafter be referred to simply as Chapter 10; Alaska Compiled Laws Annotated 1949 will be referred to as ACLA; the portion of Alaska outside of cities (also called municipal corporations), independent school districts, incorporated school districts and public utility districts will be referred to hereinafter as the "Tax Commissioner's" district; the word city shall include the municipal corporations of Juneau, Douglas and Fairbanks, each of which is classified under the laws of Alaska as a first class city.

Section 1 Mining Claims

The Act of Congress of June 3, 1948, amending section 9 of the Organic Act of Alaska provides, "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the true and full value thereof, except that unpatented mining claims and nonproducing patented mining claims, which are also unimproved, may be valued at the price paid the United States therefor, or at a flat rate fixed by the Legislature, but if the surface ground is used for other than mining purposes, and has a separate and independent value for such other purposes, or if there are improvements or machinery or other property thereon of such a

character as to be deemed a part of the realty, then the same shall be taxed according to the true and full value thereof. No tax shall be levied for territorial purposes in excess of 2 per centum upon the assessed valuation of the property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of 3 per centum of the assessed valuation of property within the town in any one year."

The legislature of Alaska by Chapter 10, which became effective on the 21st day of February, 1949, provided in section 3 thereof for the calendar year of 1949 and each calendar year thereafter, "There is hereby levied, and there shall be assessed, collected and paid a tax upon all real property and improvements and personal property in the territory at the rate of 1% of the true and full value thereof. For the purposes of this section, the assessed value of unimproved, unpatented mining claims which are not producing and non-producing patented claims upon which the improvements originally required for patent have become useless through deterioration, [108] removal or otherwise, is hereby fixed at $500 per each 20 acres or fraction of each such claim * * *."

The plaintiff has mining claims both patented and unpatented which under the terms of said section 3 would be subject to tax which have been taxed by the taxing units wherein they lie.

It is maintained by plaintiff and intervenor that the Territorial Legislature had no authority from Congress to provide in section 3 of Chapter 10 that

the value of mining claims which were nonproducing and were without improvements should be fixed at $500 for each 20 acres or fraction thereof in such claim in that such a valuation is not the price "paid the United States therefor" nor a "flat rate."

The word "flat" is ordinarily an adjective meaning "absolute; unvarying; exact; even";

Webster's International Dictionary, 2nd Ed.

In Salt Lake City v. Christensen Co., 95 P. 523, it was held that the levy of a specified tax in an equal sum upon all merchants was a flat rate.

In Holst v. Roe, 39 Oh. St., 340; 48 Am. Rep. 459, it was held that a tax per capita upon animals owned by a taxpayer would be invalid as not being according to value.

In Northwestern Improvement Co. v. State, 220 N.W. 436, a statute providing for a tax of 3 cents for each acre of mineral resources was held to be a flat tax rate per acre and invalid as not according to value.

In re opinion of the Justices (N.H) 149 Atl. 334, it was held that a proposed bill to make a valuation per acre, the test of taxibility was invalid.

"A statute is invalid which sets up an arbitrary and inflexible standard for the valuation of property * * *" 61 C. J. page 152, section 89.

In Reelfoot Lake Levy District v. Dawson (Tenn.) 36 S. W. 1042, an act of the legislature providing that the board of levy directors had the duty "to assess and levy a contribution tax not exceeding 10 cents per acre * * *" was [109] invalid as contra-

vening the Constitution which provided, "All property shall be taxed according to its value * * *"

Under section 3 of Chapter 10, a mining claim of one acre would be valued at $500 which is at the rate of $500 per acre; a claim of 10 acres would be valued at $500 which is at the rate of $50 per acre; a claim of 20 acres would be valued at $500 which is at the rate of $25 per acre; a claim of 20.1 acres, which is the maximum area of a quartz claim, would be valued at $1000 which would be at the rate of $49.75 per acre; a claim of 40 acres would be valued at $1000 which would be at the rate of $25 per acre; a claim of 160 acres would be valued at $4000 which would be at the rate of $25 per acre.

Thus the tax on mining claims is not a flat rate and the assessment is not according to the true and full value thereof required by the Organic Act.

The results of what is said hereinabove are that the territorial tax of 1% upon mining claims of plaintiff and also of the intervenor is invalid.

Section 2 Lack of Territorial Equalization Board

While Chapter 10 provides for equalization of assessments in each judicial division, there is no provision for a Board of Equalization to equalize the taxes of the various taxing districts in various judicial divisions. Counsel for plaintiff and intervenor maintain that the lack of such a board in itself makes the territorial tax of Chapter 10 lacking in uniformity.

Boards of equalization are creatures of statute.

Michigan Central Railroad v. Powers, 201 U.S. 301-302.

State Railroad Tax Case, 83 U.S. 609 61 C. J., p. 749, sec 922 and 935.

Consequently as the laws of Alaska do not require a Territorial Board of Equalization, the lack of such a board does not in itself show a lack of uniformity in the tax imposed by Chapter 10. [110]

Section 3 Uniformity of Taxation under Chapter 10

By Chapter 10, the Territorial Legislature provided for a territorial tax of one per cent of the assessed value of property, real or personal, in Alaska. It provided that a large part of such taxes were to be collected by municipalities, public utility districts and school districts at their expense. Property which was not within a municipal corporation or a school district or public utility district was to have its taxes assessed and collected by the Tax Commissioner under the special provisions of Chapter 10.

Property which lay within the boundaries of a city, or town or independent school district or incorporated school district or public utility district was to have its property assessed and collected by the municipality or district in which it lay and according to the property tax laws of that municipality or district (s 4, Ch 10). Independent school districts are composed of a city plus some surrounding area while incorporated school districts do not have any city within their boundaries.

Property which lay outside the boundaries of a city but within the boundaries of an independent

school district was to be assessed and tax collected by the officers of the independent school district according to the tax laws of the district which was allowed the same penalties, rate of interest and exemptions as its city and the power and duties of a city with reference to the levy, assessment and collection of taxes and all the laws relative to the levy and collection of taxes in municipal corporations (37-3-54).

The word uniform or uniformity as used in the Organic Act of Alaska (s. 9 as amended) is the same as used in the United States Constitution where Congress was given the power to lay excise taxes etc., "but all duties, imposts and excises shall be uniform throughout the United States."

In Knowlton v. Moore, 178 U. S. 41, the Supreme Court interpreted the meaning of the word uniform appearing in the Constitution as above mentioned. The construction approved by [111] the Court in that case was (page 84) "that the words 'uniform throughout the United States' do not relate to the inherent character of the tax as respects its operation on individuals, but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate."

And page 96, "The proceedings of the Continental Congress also make it clear that the words

'uniform throughout the United States' which were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference purely to a geographical uniformity and as synonymous with the expression, 'to operate generally throughout the United States.' "

Page 104, "The sense in which the word 'uniform' was used is shown by the fact that the committee, whilst adopting in a large measure the proposition of Mr. McHenry and General Pinckney, 'that all duties, imposts, excises, prohibitions or restraints . . . shall be uniform and equal throughout the United States,' struck out the words 'and equal.' Undoubtedly this was done to prevent the implication that taxes should have an equal effect in each State. As we have seen, the pith of the controversy during the Confederation was that even, although the same duty or the same impost or the same excise was laid all over the United States, it might operate unequally by reason of the unequal distribution or existence of the article taxed among the respective States."

In Fox v. Standard Oil Co., 294 U. S., page 102, the Supreme Court stated, "Third. The statute does not violate the constitution of West Virginia which requires that taxation shall be equal and uniform through the state. Article 10, section 1.

The constitution of Indiana has a like provision which was considered by this court when sustaining the chain store [112] tax in State Board of Tax Commissioners v. Jackson, supra, at p. 542. The

view was expressed that the standard of uniformity under the constitution of the state was substantially the same as the standard of equality under the Fourteenth Amendment of the constitution of the nation."

To the same effect is Alaska Steamship Co. v. Mullaney, 180 F. 2nd 817.

In Fernandez v. Wiener, 326 U. S. 359, the court said, "It has long been settled that within the meaning of the uniformity requirement a tax is uniform when it operates with the same force and effect in every place where the subject of it is found."

Cities have the statutory power to levy, assess and collect taxes up to and including 3% of the value of the non-exempt property within their boundaries, (s. 9, Organic Act as amended, T 48, USCA, section 44, supp.) The grant to the city by the legislature of the right to assess, collect and keep the territorial one per cent tax gives those cities the right to assess, levy and collect a total of 4% of the value of property within their boundaries.

The amendment of June 3, 1948, T 48, USCA, section 44, supp. raised the taxing ability of "any incorporated town or municipality" from 2% to 3% but did not raise the power of school districts to tax in excess of 2% of the assessed valuation.

As long as all city expenses are not over 3% of the assessed valuation of its property, there will be no difference between the sum raised by levy of 3% for the city expenses and one wherein the levy

is for 2% for city expenses plus 1% for the territorial tax. But if the city's expenses are to be over 3% of the assessed valuation of the city's property, the city will be compelled to collect the territorial tax of 1% in order to pay the expenses which are over the 3%.

An independent school district is limited to a tax levy of 2% of the assessed valuation of its property. Consequently [113] in order for it to pay expenses above 2%, it will have to utilize the territorial tax.

Cities were, by s. 4, Ch. 10, allowed to retain for their own uses the entire one per cent of the territorial tax collected by them. The independent school districts and incorporated school districts were given the right to collect and to keep such portion of the territorial taxes as was necessary for school expenses, but they were required to pay over to the Territorial Treasurer any amount of such taxes which existed after satisfying such school expenses.

As Chapter 10 levied the territorial tax and gave the entire tax to the city collecting it and as the power to tax and the power to dispose of it are inseparable powers, it appears that the levy of a tax in Chapter 10 and the giving of the same to the cities collecting were separate acts, each of which was entirely within the power of the legislature. (61 C. J. p. 1520.)

The duty to collect taxes may be laid on a municipality by the state. Some states allocate in advance part of the tax to the municipality (61 C. J. p. 1523).

Counsel for defendants assert that the legislature has in effect in Chapter 10 made two classes for taxation, to wit: the first class being property within incorporated municipalities and the second class being property outside incorporated municipalities. It is thus an alleged classification according to the location of the property.

Classifications according to the location of the property are invalid.

> Philadelphia, B. & W. R. Co. v. Mayor and Council of Wilmington (Del. 48) 57 Atl. 2nd, 759.
>
> 1 Cooley on Taxation, sec. 335.
>
> Essex County Park Comm. v. West Orange (N. J.), 73 Atl. 511.
>
> In Re State Taxation (Me.), 55 Atl. 827.
>
> Monaghan v. Lewis, 59 Atl. 948.
>
> Village of Hardwick v. Town of Walcott (Vt.) 129 Atl. 159 [114]

In Maryland, where the constitution does not forbid local laws, it was held in Grossman v. Baughan, 129 Atl. 370, that a law limited to the City of Baltimore, was valid.

As the Organic Act of Alaska (48 USCA, section 78) provides "All taxes shall be uniform upon the same class of subjects * * * " it is believed

the subject of taxation is the real and personal property of a taxpayer and that a classification of property as within or without a city would not be a classification of the subject of taxation at all.

Schoyer v. Comet Oil & R. Co. (Pa.), 130 Atl. 416, the statute made gas taxes paid to a corporation vendor a prior lien on the vendor's property. Held: that the statute was invalid as was the classification of vendors as individual or corporations.

It was stated by the court: "The test of classification is whether it produces diversity in results or lack of uniformity in its operation either on given subjects of the tax or the persons affected as payers. There must be a real distinction between the objects with which the law deals for it to be valid."

The above-mentioned classification (within or without a municipal corporation) produces diversity and lack of uniformity within each of said classes as hereinafter shown.

Also if such classification was made, it would be invalid by reason of lack of uniformity within each such classification.

The following lack of uniformity is found:

Property Within Cities

The cities of Juneau and Douglas by ordinance allow a 2% discount if the whole tax is paid before delinquent. This was by reason of an ordinance of the cities of Juneau and Douglas passed long before the passage of Chapter 10. The Territorial Legislature is presumed to have known of the or-

dinance and to have approved of the same in requiring the territorial tax to be assessed and collected according to the laws of the city wherein it lay. The tax in the City of Juneau [115] and Douglas therefore is 98/100 of 1% whereas in the City of Fairbanks no rebate is allowed and 100/100 of 1% of the territorial tax must be paid.

In the City of Juneau taxes are delinquent if the first half is not paid by 4 o'clock p.m. on November 15th of the year of levy. If not paid at that time, it becomes delinquent and the whole tax becomes due and a penalty of 15% plus interest at 12% per year is added. If the first half is paid before de-delinquent, the second half is not due until May 15th of the next year.

In the City of Fairbanks taxes are delinquent if not paid prior to October 16th of the year of levy. A penalty of 10% plus interest at 10% per year is added for delinquency. If the first half of the tax is paid on or before October 15, the second half is due March 31st of the ensuing year.

In the City of Douglas taxes are delinquent if not paid before November 16th of the year of taxation. A penalty of 10% plus 8% interest is added for delinquency. If the first half is paid before delinquent, the second half is due March 15th of the ensuing year.

The lien for the payment of taxes is impressed upon the property when the assessment is complete which in Juneau is on or before the 2nd Tuesday in October of the year of levy. (Juneau ordinance

attached to affidavit of C. L. Popejoy, filed herein January 18, 1950, sections 6, 7 and 8). In Douglas, the lien attaches in the month of August of year of levy (section 7, Ordinance of Douglas, attached to affidavit of A. J. Balog, filed herein January 18, 1950).

In the City of Fairbanks, the lien attaches on the first day of October of the year of levy.

Unless otherwise provided by statute, the tax becomes a lien upon the property taxed as soon as the levy and assessment are made and the rate fixed. 61 C. J. s. 1172, p. 922.

The statutes of Alaska and the ordinances of the cities and districts provide that the tax lien shall attach to real and personal property upon the assessment being made as hereinbefore mentioned.

S. 37-3-54; S. 16-1-35 (9) ACLA.

Also ordinances.

Property Outside the Cities

This would include all of the property within the Tax Commissioner's taxing district and public utility districts and [116] incorporated school districts and independent school districts outside the included city.

Chapter 10 provides for the following exemptions from taxes: (1) Personal property of any person to the value of $200; (2) New commercial businesses during the time of construction but not more than 3 years; (3) Homesteads from the date of final entry until one year after the patent has been granted; (4) As an industrial incentive, the Tax Commissioner with the approval of the Divisional Board of

Assessment may grant an exemption up to one-half of the territorial tax for a period not exceeding 10 years from the date production commenced (sec. 6, Ch. 10).

Exemptions granted by the Tax Commissioner as an industrial incentive mentioned above are by section 6 (h) (4) of Chapter 10 made applicable to all other taxing districts.

The exemptions other than mentioned in sec. 6 (h) (4) do not apply to any taxing district other than the Tax Commissioner's district. The cities and districts to which the city tax law has been made applicable have an exemption of $200 upon the value of the furniture of the head of a family or householder but that is much narrower than the $200 exemption mentioned as to an exemption in the Tax Commissioner's district. (16-1-35(9).)

In the independent school districts of Juneau, Douglas and Fairbanks outside the included city, there is a right to redeem from tax sales within 2 years of the sale. (See ordinances and resolution of cities and independent school districts.) In the Tax Commissioner's district, there is no such redemption.

In the school districts outside of cities, notice by publication for four consecutive weeks must be given prior to a tax sale whereas the only notice given for the sale for delinquent taxes within the Tax Commissioner's district is the filing of a delinquent list of taxes in the District Court with the clerk, another list in the Office of the Treasurer of Alaska and a third list in the Office of the Register of the [117] District Land Office (s. 42, Ch. 10). Consequently if

the territorial legislature did so classify, there were many matters within each class which were not uniform and which make the classification invalid.

The matters mentioned above as constituting lack of uniformity within and without cities constitute a lack of uniformity between taxing districts generally, the existence of which makes the taxing portion of Chapter 10 invalid. The 2% discount given by the independent school districts of Juneau and Douglas are not given anywhere else except in the cities of Juneau and Douglas.

In Fairbanks, the Fairbanks independent school district and in the Tax Commissioner's district, there is no discount on taxes.

Sec. 32, Ch. 10, effective as to the Tax Commissioner's district only, makes taxes payable upon the first day of February of the ensuing year. The lien of the tax in the Tax Commissioner's district becomes fixed upon the completion of the assessment which is to be on or before the first day of September for 1949, and thereafter on or before the first day of July (sections 16 and 34, Ch. 10).

Valuation

Sec. 11, Ch. 10 which applies only to the Tax Commissioner's district states, "The true value of property shall be the value at which the property would generally be taken in payment of a just debt from a solvent debtor." Section 9 of the Organic Act requires that assessments of property be made "according to the true and full value thereof."

Sec. 9, (Organic Act as amended) 62 St. 302, T. 48 USCA, s. 78, Supp.

Section 4 Taxes Within the City of Fairbanks

Sec. 3, Chapter 10 provides "In the calendar year of 1949 and each calendar year thereafter there is hereby levied and there shall be assessed, collected and paid a tax upon all real property and improvements and personal property in the [118] territory at the rate of one per centum of the true and full value thereof."

In sec. 4, Ch. 10, it states that within the limits of a city, the territorial tax shall be collected and enforced in the manner prescribed by the property tax laws of the municipality.

The territorial tax became a lien upon the property within the City of Fairbanks upon the 26th day of September, 1949, when the assessment rolls were by resolution accepted. (See resolution of September 26, 1949, and ordinances of City of Fairbanks attached to the motion for a preliminary injunction.)

In said resolution it was also provided that a 20 mill levy be made for the school and city expenses in addition to the one per cent territorial tax.

As the levy of the tax was made by section 3, Ch. 10 and as the City of Fairbanks assessed the property on the 26th day of September, 1949, and also in the same resolution made arrangements for the collection of the territorial tax, it had done everything required by law at that time.

However, upon the 10th day of October, 1949,

the council of the City of Fairbanks amended its resolution of September 26, 1949, by providing that there should be "0" taxes collected for the territorial tax.

Sec. 4, Ch. 10 provides that the cities may assess and collect the territorial tax on property situated in said cities in the manner prescribed by the property tax laws of the city. The city may also levy additional taxes to be assessed and collected at the same time and manner as provided in sec. 3.

Section 5 Intervenor's Case

As intervenor is the owner of property within the cities of Juneau and Douglas, the matters stated hereinbefore with reference to the legality of the tax upon the plaintiff's property in the City of Fairbanks show the illegality of Chapter 10 with reference to intervenor's said property. Likewise, [119] the conclusions announced hereinbefore relative to the illegality of said tax as to the property of the plaintiff within the Fourth Judicial Division but outside the City of Fairbanks apply to intervenor's property in the First Judicial Division but outside the cities of Juneau and Douglas.

Intervenor paid the following taxes upon its boats in the Juneau independent school district, to wit: tug Trojan 43 tons at $4, $172; mine tender Amy 22 tons at $4, $88; scow #1 22 tons, $1; scow #3 271 tons, $10; scow #4 271 tons, $10; scow #3 271 tons, $10.

It thus appears that intervenor was in no way injured by the provisions of Chapter 88, Session Laws of Alaska, 1949, amending section 3, chapter 10, so as to allow boats to be valued according to their actual value or at $4 per registered ton. It chose to have part of its boats assessed at actual value and part of them at $4 per registered ton, apparently thereby securing the lowest tax rate for its property. Intervenor is now in no position to assert the invalidity of the amendment.

Section 6 Who May Complain of the Illegality of the Tax

The general rule is of course that those only who would be injured by the operation of the illegal tax may complain of the illegality. Alaska Steamship Co. v. Mullaney, 180 F. 2nd 815.

The lien of the illegal tax has already attached to the properties of plaintiff and intervenor by reason of Chapter 10's levy in section 3. The complaint in this action states facts sufficient to constitute a suit to remove a cloud and also to prevent future clouds. The properties of intervenor and plaintiff, real and personal, are subject to tax.

The plaintiff and intervenor, as owners of mining claims outside of cities would be directly injured to the extent of any territorial tax collected from them under the provisions of Chapter 10.

These liens constituted clouds upon the owner's title prior to the bringing of this action and at all times thereafter. [120] The evidence shows that

further clouds will be cast upon property of plaintiff and intervenor on or prior to the second Tuesday in October, 1950, if they are not prevented by this suit. The lien of the Tax Commissioner's district will attach to plaintiff's property July 1, 1950.

Under the above-mentioned conditions, plaintiff and intervenor have shown that the tax imposed by Chapter 10 is illegal and that plaintiff and intervenor have a right to raise the question.

The cities of Douglas and Juneau and Fairbanks refrained from providing for the collection of the territorial 1% tax. Consequently, when the intervenor paid its taxes, it did not (though its complaint in intervention states to the contrary in paragraphs VII and VIII) pay any part of the territorial tax. The tax levy of the City of Fairbanks was 20 mills, of Juneau 20 mills and Douglas 15 mills, but in each instance the resolution fixing such rates clearly showed that it was for the school and municipal purposes of the cities and was not a levy of the territorial tax.

The Tax Commissioner has levied and assessed and is attempting and threatening to collect said territorial 1% tax for 1949 from the intervenor and the plaintiff. This tax levy has created a lien upon all of the property of plaintiff and intervenor and also casts a cloud upon the same. Taxes for the calendar year of 1950 will create a lien upon all of the property of the plaintiff and intervenor when the assessment of such property is made which will be the month of October or prior

thereto, 1950, unless there is restraint by the court.

In Port Angeles W. R. Co. v. Clallam County, 20 F. 2d 204, it stated "The allegations of the bill, for present purposes, must be taken as true, and jurisdiction in a court of equity to remove a cloud upon the title to personal property is recognized."

It was stated the taxes being spread without limitations upon the tax rule against the railway property owned by [121] the United States, cast a cloud upon such property, to the removal of which equity alone can be substantial justice.

The court quoted with approval from the following cases as follows:

Union Pacific R. Co. v. Cheyenne, 113 U. S. 516: "Even the cloud cast upon its title being taken under which such sale could be made would be a grievance which would entitle him to go into a Court of Equity for relief."

In Ohio Tax Cases, 232 U. S. 576, the court said: "Right to invoke the equity jurisdiction is clear; for the act specifically creates a lien upon the real estate of appellants from the cloud of which they seek to free it * * * and the bills alleged threatened irreparable injury through the enforcement of penalties * * *"

In Allen v. Hanks, 136 U. S. 300, it was said "Must she remain inactive while the sale proceeds and until the purchaser obtains and has recorded the Marshal's deed to her land and then bring an action to have the deed cancelled and the sale set aside as clouds upon her title? It needs no argument to show that the existing levy upon appellee's

land constitutes itself a cloud upon her title which if not removed and the proposed sale prevented will injure the saleability value of the land and otherwise injuriously affect her rights."

In Rogers v. Nichols, 71 N. E. 950, it was stated, "A bill can be maintained to prevent clouding as well as to remove a cloud from title to real estate."

Section 16-1-113, ACLA, provides that all general taxes levied shall be liens upon the property assessed. The statute as to the organization of independent school districts and their powers and the ordinances of the independent school districts and of the cities of Fairbanks, Juneau and Douglas provide that the taxes levied shall be liens upon assessment being made. Section 37-3-54; section 16-1-35 (9).

The evidence shows that plaintiff and intervenor lacked an adequate remedy at law, there being no law authorizing a city or independent school district or the Territory itself [122] to permit the payment of taxes under protest and refund the same if the law under which they were levied was declared invalid by the courts. The nearest thing to such a statute was section 48-7-1, ACLA. It provided that whenever taxes were paid to the Tax Commissioner under protest and covered into the treasury, the Tax Comissmioner could if it was approved by the Attorney General and the Treasurer issue a voucher on the general fund for the refund of the tax money.

There was no provision for paying any interest upon the money paid under protest, a matter in

itself sufficient to make the remedy inadequate.

Proctor & Gamle Etc. v. Sherman Etc., 2 F. 2nd 165. Southern Cal. Telephone Co. v. Hopkins, 13 F. 2nd 815. Hopkins v. Southern Cal. Telephone Co., 275 U. S. In affirming 13 F. 2nd 815, the Supreme Court said: P. 399, "In no permitted proceeding at law could interest upon payments be recovered for the time necessary to obtain judgments. * * * We find no clear adequate remedy at law. The equity proceeding was permissible."

Also most or all of the taxes mentioned in this case would not be paid to the Tax Commissioner but to the cities or independent school districts and so never covered into the Treasury of the Territory.

Still further, if the Tax Commissioner issued a voucher against the general funds of the territory to repay the tax paid under protest, there would be no assurance that the voucher would be paid promptly.

At best, the section above mentioned applied to payments to the Tax Commissioner and did not constitute any authority for payments to be paid under protest to municipal corporations or independent school districts.

Consequently, said section did not provide an adequate remedy to plaintiff or intervenor.

That interest cannot be recovered on taxes paid under protest and returned unless the statute especially so provides, [123] see

U. S. v. Nez Perce County, Idaho,
95 F. 2nd 232 (C.C.A. 9).

U. S. v. Lewis County, Idaho,
95 F. 2d 236.
Jackson County v. U. S.,
308 U. S. 343.

If the plaintiff or intervenor had paid the territorial tax under protest, the bringing of a number of suits would have been necessary as in every instance where the property was outside the Tax Commissioner's taxing district, the tax was either given wholly to the collecting agency (the cities), or given largely to the extent of their school expenses to the independent school districts. Thus plaintiff would have been compelled to bring 3 actions: one against the Fairbanks independent school district, the City of Fairbanks and the Territory. The intervenor would have been compelled to bring 5 suits, to wit: against the City of Juneau, the Juneau independent school district, the City of Douglas, the Douglas independent school district, and the Territory of Alaska. The bringing of the present suit therefore prevented a multiplicity of actions.

The whole of Chapter 10 is built around sections 3 and 4 which provide for the levy of the tax and its disposition. As those two sections are clearly invalid, there is nothing remaining in the chapter of any force, so the whole chapter is invalid, except as to boats or vessels under Ch. 88 SLA 1949.

Inasmuch as the evidence in this case did not show any property of plaintiff or intervenor to be in a public utility district or that there were any parcels of land lying partly in one taxing district

and partly in another, there has been little or no discussion of their effect upon the problems of plaintiff and intervenor.

Each party shall pay the costs and disbursements incurred by them or it except that the defendants the City of Fairbanks and the Fairbanks independent school district and their officers, shall recover their costs and disbursements against plaintiff and intervenor, but such costs shall not include attorney's fees.

Counsel for plaintiff and intervenor may draw Findings of Fact, Conclusions of Law and Decree in accordance with the [124] foregoing opinion.

Done at Fairbanks, Alaska, this 19th day of June, 1950.

HARRY E. PRATT,
District Judge.

[Endorsed]: Filed June 19, 1950. [125]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial before the Court on May 15, 1950, on the complaint of plaintiff and the complaint in intervention of intervenor, and the amended answer of the defendants, M. P. Mullaney, Tax Commissioner and the answers of the defendants, City of Fairbanks, Alaska, a municipal corporation and Fairbanks School District, an independent school district

corporation, and L. F. Joy, Frank Conway, A. F. Coble and Frank P. DeWree to the plaintiff's complaint, and the amended answer of defendant, M. P. Mullaney, Commissioner of Taxation, to the complaint in intervention of the intervenor (the defendant William Liese, Tax Assessor having made no appearance herein, and the defendants City of Fairbanks, Alaska, a municipal corporation, Fairbanks School District, and the defendants L. F. Joy, Frank Conway, A. F. Coble and Frank P. DeWree, Directors of the Fairbanks School District, having filed no answer to the Complaint in Intervention), and plaintiff and intervenor being represented by their attorneys, Faulkner, Banfield & Boochever, Edward F. Medley and Charles J. Clasby, and the defendant, M. P. Mullaney, Commissioner of Taxation, being represented by his attorneys, J. Gerald Williams, Attorney General of Alaska, and John H. Dimond, Assistant Attorney General of Alaska, and the City of Fairbanks by its attorney, Mike Stepovich, Jr., and the Fairbanks School District and its Directors by their attorney, Maurice T. Johnson; and evidence having been adduced before the Court on behalf of plaintiff, intervenor and the defendant, M. P. Mullaney, Commissioner of Taxation of Alaska, and arguments having been made by respective counsel for plaintiff, intervenor and defendant, M. P. Mullaney, and the cause having been submitted [126] for judgment on May 15, 1950, and the Court having taken the matter under advisement on that date and having, on the 19th day of

June, 1950, rendered its written opinion, the Court makes the following

Findings of Fact

I.

a. The plaintiff is a resident and inhabitant of the Territory of Alaska, Fourth Judicial Division, residing at Fairbanks, Alaska, and he has been such resident and inhabitant at all times mentioned herein and mentioned in the complaint;

b. That at all times in the years 1949 and 1950, plaintiff was and is the owner of the property hereinafter described, with the taxing unit or district wherein it lies specified as also the value thereof as fixed by the assessor of the taxing unit wherein it lies, to wit:

	Taxing Unit	Description of Property	Assessed Valuation
1.	City of Fairbanks	Lot Seven (7), Block Sixty (60) with cabin	$ 1,000.00
2.	Fairbanks Independent School District	Non-producing, unimproved mining claims known as Discovery Claim and One Above Discovery, also one-third (⅓) interest in Gold Engine Bench Claim (40 acres), St. Patrick's Creek, patented, and other real property	5,000.00
3.	Fourth Division of Outside of Municipalities School Districts and Utility Districts	Non-producing patented and unpatented mining claims valued according to Section 3, Chapter 10, Session Laws of Alaska, 1949, at $60,713.46, and personal property valued at $7,500.00	68,213.46

c. That the mining claims mentioned in the last preceding sub-paragraph, to wit: I b. 3., were at all times after February [127] 21, 1949, unimproved mining claims which were not and are not producing, and if patented the improvements required for patent have become useless through deterioration, removal or otherwise.

d. That the said property mentioned in I b. 3. hereof has been valued at $500.00 for each 20 acres or fraction thereof in each claim and is carried on the tax rolls of the defendant Tax Commissioner in the assessed value of $60,713.46 for the real property and $7,500.00 for the personal property, and one per cent (1%) of the valuation thereof has been charged against such property as a Territorial Tax under said Chapter 10 by the said Tax Commissioner.

II.

a. That intervenor is a corporation duly and regularly organized under the laws of West Virginia and authorized and qualified to do business in the Territory of Alaska, and it has complied with all the laws of Alaska relating to corporations doing business in the Territory of Alaska, and it has paid all corporation license taxes due the Territory and filed all reports required by law;

b. That intervenor for all of 1949 and 1950 was and is the owner of the following property in the following taxing districts of the Territory of Alaska, of the following assessed value as fixed by the official assessor, to wit:

Taxing Unit	Description of Property	Assessed Valuation	Net Tax
1. City of Douglas	Transmission Lines	$ 2,500	$ 35.75
2. Douglas Independent School District	19 Mining Claims	9,500	
	Houses	3,370	
	240 Power Plant	100,000	
	Foundry, etc.	10,000	
		$ 122,870	1,204.13
3. City of Juneau	Cars and Trucks	1,850	36.26
	Pole Lines	5,600	
	Wharf and Equipment	10,000	
	Warehouse and Shed	3,000	
	Dormitory	2,000	
	Supplies	40,000	1,187.76
	Lot 6, Block 119	500	9.80
	Lot 5, Block 27	800	
	House	10,846	
	Personal	1,000	247.86
	Lot 7, Block 5	5,000	98.00
		$ 80,596	$ 1,579.68

Taxing Unit	Description of Property	Assessed Valuation	Net Tax
4. Juneau Independent School District	Land	49,000	
	Buildings, Transmission Lines	109,000	
	Perseverance Claims	11,500	
	Salmon Creek Plant	1,518,220	
	Nugget Creek Plant	25,000	
	Sheep Creek Plant	295,430	
	9 Claims (Sheep Creek)	900	
	Building	570	
		$2,009,620	$19,694.28
	Boats and Watercraft		291.10
5. Territory of Alaska in the First Judicial Division Outside Municipalities, Independent or Incorporated School Districts, or Public Utility Districts.	Annex Plant and Equipment	50,000	
	Annex Creek Line	4,000	
	Annex Residences (3)	3,000	
		$ 57,000	
	Personal Exemption	200	
	Return Filed For	$ 56,800	
	Red Cliff Lode 0.603 acres $ 500		
	16 Patented Claims $8,000		
	10 Patented Claims $5,000		

c. That the intervenor is the owner of both patented and unpatented mining claims lying in the Douglas Independent School District, the Juneau Independent School District, and the portion of said First Judicial Division outside of municipalities, school districts and public utility districts; that said last mentioned mining claims are unimproved unpatented mining claims that are not producing; that another part of said last mentioned mining [129] claims are unimproved nonproducing patented mining claims upon which the improvements originally required for patent have become useless through deterioration, removal or otherwise.

d. That the officers of the taxing district wherein said mining claims lie have caused the mining claims of plaintiff and/or intervenor to be valued at $500.00 for each 20 acres, or fraction thereof in a claim, pursuant to said Chapter 10, (except 9 claims on Sheep Creek in the Juneau Independent School District); that the defendant M. P. Mullaney, as Tax Commissioner, is attempting to collect a one per cent (1%) tax thereon, from plaintiff and/or intervenor.

III.

a. That the incorporated cities of Fairbanks, Juneau and Douglas, and the Juneau Independent School District, the Douglas Independent School District, and the Fairbanks Independent School District did not provide for the collection of the

Territorial Tax levied under the provisions of Chapter 10, Session Laws of Alaska, 1949, as amended with the exception mentioned in Finding of Fact VI.

b. That neither plaintiff nor intervenor has paid any of the taxes levied by said Chapter 10 except on boats as mentioned hereinafter.

IV.

a. That the cities of Juneau and Douglas, and the Independent School Districts of Juneau and Douglas, by ordinance allow a two per cent (2%) discount if the whole tax is paid before any part thereof is delinquent. Thus the tax there is 98/100 of one per cent (1%), whereas in the City of Fairbanks, and other municipalities, school districts, and utility districts, no rebate [130] is allowed and 100/100 of one per cent (1%) of the Territorial tax must be paid.

b. In the City of Juneau taxes are delinquent if the first half is not paid by 4 o'clock p.m. on November 15th of the year of levy. If not paid at that time, the whole tax becomes due and a penalty of fifteen per cent (15%) plus interest at twelve per cent (12%) per year is added. If the first half is paid before delinquent, the second half is not due until May 15th of the next year.

c. In the City of Fairbanks taxes are delinquent if not paid prior to October 16th of the year of levy. A penalty of ten per cent (10%) per year is added for delinquency. If the first half of the

tax is paid on or before October 15, the second half is due March 31st of the ensuing year.

d. In the City of Douglas taxes are delinquent if not paid before November 16th of the year of taxation. A penalty of ten per cent (10%) plus five per cent (5%) interest is added for delinquency. If the first half of the tax is paid before delinquency, the second half is due March 15th of the ensuing year.

e. The lien for the payment of taxes is impressed upon the property when the assessment is complete which in Juneau is on or before the 2nd Tuesday in October of the year of levy. In Douglas, the lien attaches in the month of August of the year of levy. In the City of Fairbanks, the lien attaches on the first day of October of the year of levy.

The statutes of Alaska and the ordinances of the cities and districts provide that the tax lien shall attach to real and personal property upon the assessment being made as hereinbefore mentioned.

f. The ordinances of the cities of Douglas, Juneau and Fairbanks, and of the Juneau, Douglas and Fairbanks Independent School Districts, make no provision whereby taxes may be paid under protest, and recovered when the statute creating the tax is duly adjudged invalid. Sec. 48-7-1 ACLA only approaches such provision when taxes are paid direct to the Territory.

V.

a. Said Chapter 10, Section 6, provides for the following exemptions from taxes in favor of residents in Alaska outside municipalities, school districts, and utility districts, to wit:

1. Personal property of any person to the value of $200.00.

2. New Commercial businesses during the period of construction, but not over three years.

3. Homesteads from the date of final entry until one year after the patent has been granted.

4. As an industrial incentive, the Tax Commissioner, with the approval of the Divisional Board of Assessment, may grant an exemption up to one-half the Territorial tax for a period not exceeding 10 years from the date production commenced.

b. That the cities, the independent and incorporated school districts and the public utility districts do not have the exemptions mentioned in V a. 1., 2., and 3. They have an exemption of $200.00 upon the value of the furniture of the head of a family or householder. Exemptions allowed under V a. 4. are extended to municipalities, school and utility districts.

c. In the Independent School Districts of Juneau, Douglas and Fairbanks, outside the included cities, and in the cities of [132] Juneau and Fairbanks, there is by ordinance a right to redeem real estate from tax sales within two years of sale. No

such provision appears in the law governing the other taxing units.

d. In the municipalities of Juneau, Douglas and Fairbanks, and in the Juneau, Douglas and Fairbanks Independent School Districts notice by publication for four consecutive weeks must be given prior to a tax sale, whereas the only notice given for the sale for delinquent taxes within the Tax Commissioner's District, to wit: The part of Alaska not within a municipal corporation, an independent or incorporated school districts, or a public utility district is the filing of a delinquent list of taxes in the U. S. District Court with the Court Clerk, another list in the office of the Treasurer of Alaska, and a third in the Office of the Register of the District Land Office.

e. Section 32 of said Chapter 10, effective outside municipalities, incorporated and independent school districts, and public utility districts, makes taxes payable upon the first day of February of the ensuing year. These taxes become a lien upon the completion of the assessment which by the terms of said Chapter 10 is to be on or before the first day of September, 1949, and on or before the first day of July in subsequent years.

f. In independent and incorporated school districts and public utility districts the taxes imposed are a personal liability of the taxpayer. In the Territory at large outside of said incorporated and independent school districts, public utility districts

and cities, the taxes are not a personal liability of the taxpayer. In the other taxing districts, the owners of real property are not personally liable for the taxes thereon.

g. The said Chapter 10 provides for interest at the rate [133] of six per cent (6%) per year with no penalty upon delinquent taxes on property outside municipalities, independent and incorporated school districts and public utility districts. The Juneau and Douglas Independent School Districts impose a twelve per cent (12%) penalty with no interest on delinquent taxes, and the Fairbanks Independent School District imposes a penalty of ten per cent (10%) on delinquent taxes with interest at six per cent (6%) on both tax and penalty.

VI.

That plaintiff has no boats or vessels; that intervenor had six boats in the Juneau Independent School District engaged in marine service on a commercial basis, as follows:

	Value	Tax
Tug Trojan, 43 tons at $4.00		$172.00
Minetender Amy, 22 tons at $4.00		88.00
Scow No. 1, 22 tons	$ 100.00	1.00
Scow No. 3, 271 tons	1,000.00	10.00
Scow No. 4, 271 tons	1,000.00	10.00
Scow No. 5, 271 tons	1,000.00	10.00

That intervenor elected to have such boats valued and taxed as aforesaid and paid said taxes voluntarily on January 20, 1950, two days after the motion for a preliminary injunction against defend-

ant Mullaney was filed herein on behalf of the intervenor.

Based on the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

I.

That neither the plaintiff nor the intervenor is in a position to assert that Chapter 88 of the Session Laws of Alaska, 1949, is invalid so this Court will not consider whether said Chapter 88 is valid or invalid. What is said hereinafter is said [134] as to property other than boats or vessels.

II.

That plaintiff and intervenor have no adequate remedy at law and the enforcement of Chapter 10, Session Laws of Alaska, 1949, would have resulted in irreparable injury to plaintiff and intervenor, and that the bringing of this action prevented a multiplicity of actions.

III.

That the tax levied by said Chapter 10 on unimproved, unpatented mining claims which are not producing, and upon unimproved, non-producing patented mining claims upon which the improvements originally required for patent have become useless through deterioration, removal or otherwise, is contrary to Section 9 of the Organic Act of the Territory of Alaska, as amended by the Act of Congress of June 3, 1948, and is therefore invalid as not

valuing said claims according to their full and true value, nor at the price paid the United States therefor, nor at a flat rate fixed by the legislature.

IV.

That the tax levied by Chapter 10, Session Laws of Alaska, 1949, and attempted to be collected by defendant M. P. Mullaney, Commissioner of Taxation, on any of the property of the plaintiff and intervenor, other than boats, is invalid, as not being valued and uniform as required by Section 9 of the Organic Act of the Territory of Alaska, and as being a taking of property without due process of law, forbidden by the Fifth Amendment to the Constitution of the United States of America.

V.

The last sentence in Section 11 of said Chapter 10 [135] provides that "the true value of property shall be that value at which the property would generally be taken in payment of a just debt from a solvent debtor," and the same is contrary to the provisions of Section 9 of the Organic Act of the Territory of Alaska, and is invalid.

VI.

That the tax levied by said Chapter 10 impressed a lien before the filing of this action upon the property of the plaintiff for the sum of $680.13, and on the property of the intervenor in the sum of $703.00, for the year 1949; that such liens constitute a cloud

on the title of the plaintiff to his properties and on the title of the intervenor to its properties, situate in the Territory of Alaska outside of municipalities, independent and incorporated school districts, and public utility districts, which cloud plaintiff and intervenor are legally entitled to have removed herein.

VII.

That the temporary injunction heretofore issued in this cause restraining the defendant M. P. Mullaney, Commissioner of Taxation, and his agents, deputies, official representatives, and all persons acting under him, from enforcing the provisions of Chapter 10, Session Laws of Alaska, 1949, against the property (other than boats and vessels) of plaintiff and intervenor herein, should be made permanent and the bonds given pursuant to the requirement of the preliminary injunction exonerated and the sureties thereon discharged.

VIII.

That no cause of action was shown against the defendants other than defendant M. P. Mullaney, Commissioner of Taxation [136] and this case should be dismissed as to them.

IX.

That defendant Liese made no appearance and had no costs; that the other defendants, other than said M. P. Mullaney, Commissioner of Taxation, are entitled to recover their costs and disbursements, other than attorneys' fees, from plaintiff and inter-

venor; that plaintiff and intervenor and defendant M. P. Mullaney shall pay their own costs and disbursements.

Dated at Fairbanks, Alaska, this 1st day of August, 1950.

/s/ HARRY E. PRATT,
District Court Judge.

Copy received this 1st day of August, 1950.

/s/ CHAS. J. CLASBY,
Of Counsel for Plaintiff and Intervenor.

/s/ MIKE STEPOVICH, JR.,
Attorney for City of Fairbanks.

/s/ MAURICE T. JOHNSON,
Attorney for Fairbanks School District and the Board of Directors.

[Endorsed]: Filed August 1, 1950. [137]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that M. P. Mullaney, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree entered in this action on the 1st day of August, 1950.

J. GERALD WILLIAMS,
Attorney General of Alaska.

/s/ JOHN H. DIMOND,
Assistant Attorney General, Attorneys for Defendant-Appellant, M. P. Mullaney.

[Endorsed]: Filed August 7, 1950. [141]

In the District Court for the Territory of Alaska,
Fourth Judicial Division
No. 6352

LUTHER C. HESS.

Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska, et al.,

Defendants.

ALASKA JUNEAU GOLD MINING CO., a Corporation,

Intervenor.

AMENDED JUDGMENT AND DECREE

This cause having come on regularly for trial before the Court on May 15, 1950, on the complaint of plaintiff and the complaint in intervention of intervenor, and the amended answer of defendant, M. P. Mullaney, Tax Commissioner and the answers of the defendants, City of Fairbanks, Alaska, a municipal corporation and Fairbanks School District, an independent school district corporation, and L. F. Joy, Frank Conway, A. F. Coble and Frank P. DeWree to the plaintiff's complaint, and the amended answer of defendant, M. P. Mullaney, Commissioner of Taxation, to the complaint in intervention of the intervenor (the defendant William Liese, Tax Assessor, having made no appearance herein, and the defendants City of Fairbanks, Alaska, a municipal corporation, Fairbanks School District, and the defendants L. F. Joy, Frank Conway, A. F. Coble and Frank P. DeWree, Directors of the Fairbanks School District, having filed no answer to the Complaint in Intervention), and plaintiff and intervenor being represented by their attorneys, Faulkner, Banfield & Boochever, Edward F. Medley and Charles J. Clasby, and the defendant, M. P. Mullaney, Commissioner of Taxation, being represented by his attorneys, J. Gerald Williams, Attorney General of Alaska, and John H. Dimond, Assistant Attorney General of Alaska, and the City of Fairbanks by its attorney, Mike Stepovich, Jr., and the Fairbanks School District and its Directors by their attorney, Maurice T. Johnson;

and evidence having been adduced before the Court on behalf of plaintiff, intervenor and the defendant, M. P. Mullaney, Commissioner of Taxation of Alaska, and arguments having been made by respective counsel for plaintiff, intervenor and defendant, M. P. Mullaney, and the cause having been submitted for judgment on May 15, 1950, and the Court having taken the [138] matter under advisement on that date and having thereafter, on the 19th day of June, 1950, rendered its written opinion which was on that day filed with the Clerk of the Court, and the Court having made and filed herein its Findings of Fact and Conclusions of Law.

It Is Hereby Ordered, Adjudged and Decreed:

1. That the defendant, M. P. Mullaney, as Commissioner of Taxation, Territory of Alaska, and his agents, officers and employees, and his and their successors, be, and they hereby are, enjoined permanently from collecting from plaintiff or from the intervenor the tax imposed by Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, upon property, other than boats and vessels, owned by them in the Territory of Alaska, outside municipalities, independent or incorporated school districts, and public utility districts, and from attempting to make collection thereof hereafter;

2. That the defendant, M. P. Mullaney, Commissioner of Taxation, be, and he is hereby, ordered and directed to strike from the tax roll of real and personal property for the year 1949, property,

other than boats and vessels, situate in the Territory of Alaska, outside of municipalities, independent and incorporated school districts, and public utility districts, and owned by plaintiff and the intervenor, against which a tax has been levied pursuant to the said Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Sessions Laws of Alaska, 1949.

It Is Further Ordered That the bonds heretofore filed by the plaintiff and by the intervenor on January 30, 1950, in the sum of $1,000.00 each, upon the issuance of the preliminary [139] injunction on that date, be, and they are each hereby exonerated and the sureties thereon are relieved of all further liability; and

It Is Further Ordered that this action as against the City of Fairbanks, a municipal corporation, and the Fairbanks School District, an independent school district corporation, and L. F. Joy, Frank Conway, A. F. Coble and Frank P. DeWree, Directors of the Fairbanks School District, and William Liese, Tax Assessor for the Fourth Judicial Division of Alaska, defendants, be and it is hereby dismissed, as to such defendant, and that such defendants, other than M. P. Mullaney and William Liese, recover from the plaintiff and the intervenor their costs and disbursements herein, not including any attorney's fees, and that no further costs be allowed to any party in this action.

This amended judgment and decree shall supercede the judgment and decree hereinbefore filed and shall be effective as of the first day of August, 1950.

Dated at Fairbanks, Alaska, this 8th day of August, 1950.

/s/ HARRY E. PRATT,
District Court Judge.

Copy received this 8th day of August, 1950.

/s/ CHAS. J. CLASBY,
Of Counsel for Plaintiff and Intervenor.

Entered Aug. 8, 1950.

[Endorsed]: Filed August 8, 1950. [140]

[Title of District Court and Cause.]

STIPULATION RE SUMMARY OF EVIDENCE

It is hereby stipulated and agreed by and between Faulkner, Banfield and Boochever, attorneys for above named plaintiff and intervenor, and John H. Dimond, Assistant Attorney General, attorney for defendant, M. P. Mullaney, that the following described documents offered and admitted in evidence in full at the trial of this cause on the 15th day of May, 1950, (shown on page 2 of the Reporter's Transcript of Record) as plaintiff's and intervenor's exhibits numbered 5, 6, 7, 8, 9, 11, 12 and 14, may be considered as having been read into evidence in their entirety at the time they were so offered and admitted therein:

Plaintiff's and Intervenor's Exhibit No. 5, con-

sisting of the affidavit of January 9, 1950, of C. L. Popejoy, Clerk of the City of Juneau. Attached thereto is a copy of the property tax ordinance of the City of Juneau, together with excerpt from the minutes of the meeting of October 21, 1949, of the Common Council of the City of Juneau.

Plaintiff's and Intervenor's Exhibit No. 6, consisting of the affidavit of January 9, 1950, of Mrs. Daniel Livie, Clerk of the Juneau Independent School District. Attached thereto is a copy of the property tax ordinance of the Juneau Independent School District, together with extracts of the minutes of the special meeting of August 19, 1949, of the Board of Directors of the Juneau Independent School District.

Plaintiff's and Intervenor's Exhibit No. 7, consisting of the affidavit of May 4, 1950, of Mrs. Daniel Livie, Clerk of the Juneau Independent School District.

Plaintiff's and Intervenor's Exhibit No. 8, consisting of the affidavit of January 9, 1950, of Celia A. Wellington, Clerk and Tax Collector of the

Douglas Independent School District. Attached thereto is a copy of the property tax ordinance of the Douglas Independent School District, together with extract from the minutes of the regular meeting of October 5, 1949, of the Board of Directors of the Douglas Independent School District.

Plaintiff's and Intervenor's Exhibit No. 9, consisting of the affidavit of January 9, 1950, of A. J. Balog, [41] City Clerk, Tax Assessor, Tax Collector and Treasurer of the City of Douglas. Attached thereto is the property tax ordinance of the City of Douglas, together with the minutes of the regular meeting of September 12, 1949, of the Common Council of the City of Douglas.

Plaintiff's and Intervenor's Exhibit No. 11, consisting of the affidavit of January 17, 1950, of E. A. Tonseth, Clerk of the City of Fairbanks. Attached thereto is the property tax ordinance of the City of Fairbanks.

Plaintiff's and Intervenors Exhibit No. 12, consisting of Resolutions of the Common Council of the City of Fairbanks, of September 26, 1949, and October 10, 1949.

Plaintiff's and Intervenor's Exhibit No. 14, consisting of the affidavit of January 17, 1950, of Frank Conway, Clerk of the Fairbanks Independent School District. Attached thereto are three resolutions of the Fairbanks Independent School District.

And it is further stipulated and agreed that the attached documents entitled:

Property Tax Ordinance of the City of Juneau,

which consists of a summary of plaintiff's and intervenor's Exhibit No. 5.

Tax Ordinance of the Juneau Independent School District, which consists of a summary of plaintiff's and intervenor's Exhibits Nos. 6 and 7.

Tax Ordinance of the Douglas Independent School District, which consists of a summary of plaintiff's and intervenor's Exhibit No. 8.

Property Tax Ordinance of the City of Douglas, which consists of a summary of plaintiff's and intervenor's Exhibit No. 9.

Property Tax Ordinance of the City of Fairbanks, which consists of a summary of plaintiff's and intervenor's Exhibits Nos. 11 and 12.

Tax Resolution of the Fairbanks Independent School District, which consists of a summary of plaintiff's and intervenor's Exhibit No. 14.

are material evidence and a true statement of the material portions of said exhibits, and may be regarded as true by the United States Court of Appeals for the Ninth Circuit and deemed by said Court [42] to be part of the record of this case, without the necessity of transcribing and printing said exhibits in full.

Dated at Juneau, Alaska, this 9th day of August, 1950.

FAULKNER, BANFIELD
& BOOCHEVER,
MEDLEY & HAUGLAND,
CHARLES J. CLASBY,
Attorneys for Plaintiff
And Intervenor.

/s/ JOHN H. DIMOND,
Attorney for Defendant,
M. P. Mullaney.

Order

Approved this....day of....., 1950, and Ordered, when filed in the office of the Clerk of this Court, to supersede, for the purposes of the appeal herein, plaintiff's and intervenor's Exhibits Nos. 5, 6, 7, 8, 9, 11, 12 and 14; and further

Ordered to be copied, together with other portions of the record in this case designated by the parties, and certified to the United States Court of Appeals for the Ninth Circuit as part of the record on appeal herein.

Dated at Fairbanks, Alaska, this....day of ....., 1950.

....,
District Judge [43]

Property Tax Ordinance of the City of Juneau

Ordinance No. 329 of the City of Juneau, Alaska, passed and approved May 20, 1949, provides for the assessment, levy and collection of taxes and for the sale of property, both real and personal, for delinquent taxes, penalties, interest and costs.

(1) Rate of Tax

On the third Friday in October of each year, or as soon thereafter as possible, the Common Council shall fix the rate of tax levy for the year, designat-

ing the number of mills on each dollar of assessed value of the property, real and personal, for school and municipal purposes, and also any millage rate assessed by the city for the Territory of Alaska. At a meeting of the Common Council held on October 21, 1949, taxes for 1949 were levied on all real and personal property within the City of Juneau at a tax rate of 20 mills, which was the same as the tax rate for the year 1948. No other taxes were levied for 1949.

(2) Property Subject to Taxation

All property, both real and personal and of every kind and nature not exempt under this Ordinance, is subject to taxation for school and municipal purposes. It is provided further that "personal property" shall include all property defined or held to be such under the laws of the Territory.

(3) Exemptions

All property of the United States of America, the Territory of Alaska and the City of Juneau, and the household furniture of the head of a family or a householder, not exceeding $200.00 in value, as well as all property used exclusively for religious, educational and charitable purposes, and the property of any organization, not [44] organized for business purposes, whose membership is composed entirely of the veterans of any wars of the United States, and the property of the auxiliary of any

such organization and all monies on deposit, shall be exempt from taxation; provided that if any organization composed of veterans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt.

(4) Assessment

Assessment is based on the actual value of the property and is to be assessed to the owner or claimant thereof as of 12 o'clock noon on June 1 of each year.

(5) When Taxes Become Delinquent

Taxes will be delinquent after 4 o'clock p.m. of the 15th day of November of each year unless one-half of the taxes assessed shall have been paid on or before that time; provided that the remaining one-half of said taxes shall not become delinquent until after 4 o'clock p.m. of the 15th day of May of the year following.

(6) Discount

If the taxes on any real or personal property are paid in full on or before 4 o'clock p.m. of November 15 of the year in which they are assessed and levied, a discount of 2% shall be allowed on such taxes so paid.

(7) Penalty and Interest

On all delinquent taxes a penalty shall be imposed and added which shall be a sum equal to 15% of the taxes assessed, and interest shall be added on

the delinquent taxes and penalty owing at the rate of 12% per annum from [45] the date of delinquency.

(8) Lien Provisions

All taxes levied under this Ordinance constitute a lien upon all the property assessed, both real and personal when the assessment is completed, which must be on or before the second Tuesday in October of the year of levy, and such lien shall be prior and paramount to all other liens and encumbrances against the property assessed. On or before the 15th day of June of each year, the City Clerk shall make up a roll in duplicate of all property assessed on which the tax has not been paid and is delinquent. As soon as convenient after completion of said delinquent tax roll, the City Clerk shall cause to be published in a newspaper of general circulation in the City of Juneau once each week for a period of four successive weeks, a notice setting forth that the delinquent tax roll of real property has been completed and is open for public inspection at the office of the City Clerk and that on a certain day not less than 30 days after the completion of the publication of such notice, the said roll will be presented to the District Court for the First Judicial Division, Territory of Alaska, at Juneau, for judgment and order of sale. During the time of the publication and up to the time of the order of sale, any person may appear and make payment of the taxes due, plus penalty and interest. The sale of real property for taxes ordered by the said

Court shall be made according to the provisions of §§16-1-127—16-1-128 ACLA 1949. After the delinquent tax roll is filed with the court, any taxpayer having any interest in any tract therein listed, may appear and have a hearing on his objections. [46]

(9) Redemption

Any real property sold for delinquent taxes is subject to redemption within a period of two years from the date of sale, as provided by §§16-1-129—16-1-130 ACLA 1949.

(10) Personal Liability

The owner of all personal property assessed shall be personally liable for the amount of taxes against his personal property, and such tax, together with penalty and interest, may be collected after the same becomes due in a personal action brought in the name of the City of Juneau against such owner in the courts of the Territory of Alaska or in any other manner now or hereafter provided by law. The lien of personal property taxes may also be enforced by distraint and sale of the personal property of the person assessed.

(11) Equalization

The Common Council meets as a Board of Equalization on the second Monday in September of each year for not less nor more than seven days for the purpose of examining the assessment list, for the purpose of hearing complaints and protests of tax-

payers and for the purpose of equalizing and revising assessments where such is necessary. Said board has power to raise or lower the value of any property, real or personal, which it may deem not equally or uniformly assessed or not assessed at its actual value. Any person desiring a reduction or change in the assessment of property assessed to him shall make application, either in writing or in person, to the Board of Equalization for such reduction. [47]

Tax Ordinance of the Juneau Independent School District

Ordinance No. 11 of the Juneau Independent School District provides for the assessment, levy and collection of taxes and for the sale of property, both real and personal, for the payment of taxes, penalty, interest and costs.

(1) Rate of Tax

The Board of Directors of the Juneau Independent School District shall meet on the Friday next after the adjournment of the Board of Equalization and fix the rate of tax levy for the year, designating the number of mills levied on each dollar of assessed property, real and personal, within the district and outside the corporate limits of the City of Juneau, Alaska, for school purposes, as equalized by the Board of Equalization for that year. At a meeting of the board held on August 19, 1949, the school tax levy for the school year 1949-1950 was set at 10 mills. Of this amount 7

mills was used for school purposes within the school district and the remaining 3 mills was turned over to the Territory of Alaska pursuant to the provisions of the Alaska Property Tax Act. The rate of taxation for the year 1948-1949 was 7 mills.

(2) Property Subject to Taxation

All property within that portion of the school district lying outside the incorporated city of Juneau, Alaska, both real and personal of every nature, not exempt under the laws of the United States or the Territory of Alaska, is subject to taxation for school purposes. It is provided further that the term "personal property" shall include all property defined as such by the laws of the Territory of [48] Alaska.

(3) Exemptions

The following property is exempt: All property belonging to the municipality or the Territory, all property exempt under the laws of the United States, and the household furniture of the head of the family or a householder, not exceeding $200 in value, as well as all property used exclusively for religious, educational, charitable purposes and the property of any organization, not organized for business purposes, whose membership is composed entirely of veterans of any wars of the United States, or the property of the Auxiliary of any such organization and all monies on deposit, provided that if any organization composed of veterans or its auxiliary derives any rentals or profits from any

such property owned by it or them, such property shall not be exempt.

(4) Assessment

The assessor must between the first Friday in May and the second Monday in July of each year, list all property subject to taxation for school purposes, and he must assess such property at its just and fair value to the person, partnership or corporation by whom it is claimed or owned or in whose possession or under whose control it was at 12 o'clock midnight on the first day of June of the same year. All assessments shall be equal and uniform and based upon the actual value of the property assessed.

(5) When Taxes Become Delinquent

On the first day of October of each year at 6 o'clock p.m. all unpaid taxes shall become delinquent, provided, however, that if one-half of the assessed taxes shall have [49] been paid on or before the said first day in October of each year before the hour of 6 o'clock p.m., the remaining one-half of said assessed taxes shall not become delinquent until the first day of March of the following year at the hour of 6 o'clock p.m.

(6) Discount

If the taxes on any real or personal property are paid in full on or before the first day of October at 6 o'clock p.m. of the year in which they are assessed and levied, a discount of 2% shall be allowed on such taxes.

(7) Penalty and Interest

On all delinquent taxes a penalty shall be added which shall be a sum equal to interest at the rate of 12% per annum on the sum delinquent from the date of such delinquency until such taxes are paid.

(8) Lien Provisions

All taxes levied under this ordinance shall be a lien upon all the property assessed and shall be prior and paramount to all other liens and encumbrances against the said property. The said lien shall attach upon the assessment being made, which shall be on or before August 1 of each year. On or before the first day of June of each year, the clerk shall make up a delinquent tax roll, which shall be filed with the clerk and be open to the inspection of the public. As soon as said delinquent tax roll is filed, the clerk shall cause to be published in a newspaper of general circulation published within the district, once each week for a period of four successive weeks, a notice setting forth that the delinquent tax roll has been [50] completed and is open for public inspection and that the said roll will be presented to the District Court for the Territory of Alaska, Division No. 1 at Juneau, for judgment and order of sale. During the period of publication of such notice and up to the time of the order of sale, any person may appear and make payment of delinquent taxes, together with penalty and interest. After said publication is completed, the delinquent tax roll shall be presented to the District Court for an order of sale

of all the real property therein listed, and the proceedings with reference to the notice of sale, sale of the property and execution of certificates and deeds shall be as provided by the laws of the Territory of Alaska. (§37-3-53 ACLA 1949). After the delinquent tax roll is filed with the court, the owner of the property assessed and on which a reduction is sought, or someone on his behalf, may appear before the court and have a hearing on his objections, provided that he shall have appeared and presented his objections before the Board of Equalization for the year in which the assessment in question shall have been made.

(9) Redemption

Any real property sold for delinquent taxes is subject to redemption for a period of two years from the date of sale.

(10) Personal Liability

The owner of all personal property assessed shall be personally liable for the amount of taxes assessed against his personal property, and such tax, together with penalty and interest, may be collected in a personal action brought in the name of the Board against such owner in the courts of the Territory. A lien of personal property taxes may also be **[51]** enforced by distraint and sale of the personal property of the person assessed.

(11) Equalization

The Board shall meet as a Board of Equalization on the third Monday of August of each year and shall examine the assessment list, shall equalize and revise the assessment when such is necessary, and shall hear any complaints and protests which may be made on the part of taxpayers or owners of the property assessed. The Board shall continue in session for not less than three nor more than seven days. Any person desiring a reduction in the assessment of any property assessed to him shall make application to the Board of Equalization for such reduction either in writing or in person. [52]

Tax Ordinance of the Douglas Independent School District

Ordinance No. II of the Douglas Independent School District provides for the assessment, levy and collection of taxes and for the sale of property, both real and personal, for the payment of taxes, penalty, interest and costs.

(1) Rate of Tax

The Board of Directors of the Douglas Independent School District shall meet on the Friday next after the adjournment of the Board of Equalization and fix the rate of tax levy for the year, designating the number of mills levied on each dollar of assessed property, real and personal, within the district and outside the corporate limits of the City of Douglas, Alaska, for school purposes, as equalized by the Board of Equalization for that year. At a meeting

of the Board held on October 5, 1949, a real and personal property tax of 10 mills was levied for the year 1949. The rate of taxation for the year 1948 was 12 mills.

(2) Property Subject to Taxation

All property within that portion of the school district lying outside the incorporated city of Douglas, Alaska, both real and personal of every nature, not exempt under the laws of the United States or the Territory of Alaska, is subject to taxation for school purposes. It is provided further that the term "personal property" shall include all property defined as such by the laws of the Territory of Alaska.

(3) Exemptions

The following property is exempt: All property belonging to the municipality or the Territory, all property exempt under the laws of the United States, and the household furniture of the head of the family or a householder, [53] not exceeding $200 in value, as well as all property used exclusively for religious, educational or charitable purposes, and the property of any organization, not organized for business purposes, whose membership is composed entirely of veterans of any wars of the United States, or the property of the auxiliary of any such organization and all monies on deposit, provided that if any organization composed of veterans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt.

(4) Assessment

The assessor must between the first Friday in May and the second Monday in July of each year, list all property subject to taxation for school purposes, and he must assess such property at its just and fair value to the person, partnership or corporation by whom it is claimed or owned or in whose possession or under whose control it was at 12 o'clock midnight on the first day of June of the same year. All assessments shall be equal and uniform and based upon the actual value of the property assessed.

(5) When Taxes Become Delinquent

On the first day of October of each year at 6 o'clock p.m. all unpaid taxes shall become delinquent, provided, however, that if one-half of the assessed taxes shall have been paid on or before the said first day in October of each year before the hour of 6 o'clock p.m., the remaining one-half of said assessed taxes shall not become delinquent until the first day of March of the following year at the hour of 6 o'clock p.m. [54]

(6) Discount

If the taxes on any real or personal property are paid in full on or before the first day of October at 6 o'clock p.m. of the year in which they are assessed and levied, a discount of 2% shall be allowed on such taxes.

(7) Penalty and Interest

On all delinquent taxes a penalty shall be added

which shall be a sum equal to interest at the rate of 12% per annum on the sum delinquent from the date of such delinquency until such taxes are paid.

(8) Lien Provisions

All taxes levied under this ordinance shall be a lien upon all the property assessed and shall be prior and paramount to all other liens and encumbrances against the said property. The said lien shall attach upon the assessment being made, which shall be on or before August 1 of each year. On or before the first day of June of each year, the clerk shall make up a delinquent tax roll, which shall be filed with the clerk and be open to the inspection of the public. As soon as said delinquent tax roll is filed, the clerk shall cause to be published in a newspaper of general circulation published within the district, once each week for a period of four successive weeks, a notice setting forth that the delinquent tax roll has been completed and is open for public inspection and that the said roll will be presented to the District Court for the Territory of Alaska, Division No. 1 at Juneau, for judgment and order of sale. During the period of publication of such notice and up to the time of the order of sale, any person [55] may appear and make payment of delinquent taxes, together with penalty and interest. After said publication is completed, the delinquent tax roll shall be presented to the District Court for an order of sale of all the real property therein listed, and the proceedings with reference to the notice of sale, sale of the property and execution of certificates and

deeds shall be as provided by the laws of the Territory of Alaska. (§37-3-53 ACLA 1949). After the delinquent tax roll is filed with the court, the owner of the property assessed and on which a reduction is sought, or someone on his behalf, may appear before the court and have a hearing on his objections, provided that he shall have appeared and presented his objections before the Board of Equalization for the year in which the assessment in question shall have been made.

(9) Redemption

Any real property sold for delinquent taxes is subject to redemption for a period of two years from the date of sale.

(10) Personal Liability

The owner of all personal property assessed shall be personally liable for the amount of taxes assessed against his personal property, and such tax, together with penalty and interest, may be collected in a personal action brought in the name of the Board against such owner in the courts of the Territory. A lien of personal property taxes may also be enforced by distraint and sale of the personal property of the person assessed.

(11) Equalization

The Board shall meet as a Board of Equalization on the [56] third Monday of August of each year and shall examine the assessment list, shall equalize and revise the assessment when such is necessary,

and shall hear any complaints and protests which may be made on the part of taxpayers or owners of the property assessed. The Board shall continue in session for not less than three nor more than seven days. Any person desiring a reduction in the assessment of any property assessed to him shall make application to the Board of Equalization for such reduction either in writing or in person. [57]

Property Tax Ordinance of the City of Douglas

Ordinance No. 9 of the City of Douglas, Alaska, passed and approved on July 25, 1938, as amended by the Council at a meeting held September 12, 1949, providing for the assessment, levy and collection of taxes on real and personal property within the City of Douglas, Alaska.

(1) Rate of Tax

The common council of the City of Douglas, at its first meeting in August of each year shall fix the rate of city tax, designating the number of mills on each dollar of taxable property within the city. At a meeting of said council held on September 12, 1949, taxes were levied on all real and personal property within the City of Douglas at a tax rate of 15 mills. No other taxes were levied for that year.

(2) Property Subject to Taxation

All property within the City of Douglas not exempt under the laws of the United States or this ordinance is subject to taxation for municipal purposes.

(3) Exemptions

Household goods of each householder or head of a family, not exceeding $200 in value, all property belonging to the municipality, and all property used exclusively for religious, educational and charitable purposes.

(4) Assessment

Property is assessed to the person by whom it was owned or claimed or in whose possession or control it was at 12 o'clock noon on the first day of June of each year, and the assessment shall conform to the true value of such property in money. [58]

(5) When Taxes Become Delinquent

Taxes are delinquent after November 15 of the year of taxation, unless one-half of the taxes shall have been paid before that date; provided that the remaining one-half of said taxes shall not become delinquent until after March 15 of the ensuing year.

(6) Discount

A discount of 2% will be allowed if taxes are paid before delinquent.

(7) Penalty and Interest

The Ordinance provides for 5% penalty on delinquent taxes with no interest. However, at a meeting of the city council held September 12, 1949, a resolution was adopted providing for 10% penalty and 8% interest on delinquent taxes.

(8) Lien Provisions

All taxes assessed and levied under this Ordinance shall be a preferred lien on the property so taxed and shall attach in the month of August of the year of levy, which lien shall be foreclosed and the property sold as provided by Ch. 44 C.L.A. 1933 (§§16-1-121—16-1-128 ACLA 1949).

(9) Redemption

Any real property sold for delinquent taxes is subject to redemption within a period of two years from the date of sale, as provided by §§16-1-129—16-1-130 ACLA 1949.

(10) Personal Liability

The tax ordinance of the City of Douglas does not make any specific provision imposing any personal liability on a taxpayer for failure to pay taxes on real or personal [59] property; however, the ordinance does provide that personal property may be seized and sold for delinquent taxes.

(11) Equalization

The Common Council shall meet as a Board of Equalization on the first Monday of August of each year and continue in session until the following Wednesday, to examine the assessment book and equalize the assessments of property in the City of Douglas. Said board may, after giving three days notice to parties interested, increase or lower any assessment contained in the assessment roll so as to

equalize the assessment of property contained in said roll and make the assessment conform to the true value of property in money. Any person desiring a reduction on the assessment of his property shall file with the board of equalization a written application therefor. Any person disssatisfied with the final decision of the board of equalization may appeal from this decision to the United States District Court for the Territory of Alaska, Division Number One, within thirty days from the time of the rendition of the said decision. [60]

Property Tax Ordinance of the City of Fairbanks

Ordinance No. 384 of the City of Fairbanks, Alaska, passed and approved on February 13, 1946, providing for the assessment, levy and collection of taxes on real and personal property within the City of Fairbanks, Alaska.

(1) Rate of Tax

The Common Council of the City of Fairbanks shall at its first regular meeting after it shall have completed equalization of the assessment rolls, or at a special meeting called for that purpose, levy a tax on all taxable property in the city, as shown by the assessment rolls, not to exceed 2% of the assessed valuation thereof as equalized. At a meeting of the council held September 26, 1949, a tax for school and municipal purposes upon all taxable real and personal property in the City of Fairbanks was levied at a rate of 20 mills, in addition to the 1% territorial general property tax. This resolution was amended at a subsequent meeting of the council held

October 10, 1949, at which time the tax provided to be levied for school and municipal purposes under the provisions of Ordinance No. 384 was set at a rate of 20 mills and the tax under the territorial general property tax law was set at the rate of 0 mills. The rate of taxation on all real and personal property was the same for 1949 as it was for the year 1948.

(2) Property Subject to Taxation

All real and personal property situated in the City of Fairbanks and all personal property used in connection with or in the carrying on of any business or occupation conducted in said city, whether said personal property be therein situated or not, is subject to taxation for school and [61] municipal purposes, except such property as is expressly exempted by law. It is provided that personal property shall be construed to include, embrace and mean, without especially defining or enumerating it, all goods, bonds, franchises, chattels, monies and legal tender of all description, including national bank notes, gold and silver certificates and all government medium of exchange commonly known and designated as "paper money" or "currency," capital stock of corporations and shares in incorporated companies, and all improvements on lands held under lease, or otherwise, from another.

A special method is provided in the ordinance for assessing individuals, firms, corporations or associations carrying on a general banking business. It is provided that every year at such times as provided

for the listing of property for taxation, every such bank shall by its accounting officer furnish the city assessor a statement verified by oath giving the amount of paid up stock, the amount of surplus reserve fund and the amount of undivided profits of such bank. The aggregate amount of capital, surplus and undivided profits shall be assessed and taxed as other like property in Fairbanks is assessed and taxed. Provided, that at the time of listing the capital stock, the amount and description of its legally authorized investments is assessed and taxed under this ordinance, and the assessor shall deduct the amount of such assessment of real estate from the amount of such capital, surplus and undivided profits, and the remainder shall then be taxed as above provided.

(3) Exemptions

The following property is exempt from taxation: All property belonging to the Town of Fairbanks, Alaska; all property used exclusively in said Town for religious, educational or charitable purposes; all property belonging to the United States of America; all property belonging to the Territory of Alaska; all household furniture or effects of the head of a family or household; not exceeding in value the sum of $200; all property of any organization composed entirely of veterans of any wars of the United States or the property of the auxiliary of any such organization, and all moneys owned by them and on deposit in any bank, provided that if any such organization or auxiliary shall derive any rental or

profits from any such property, such property shall not be exempt from taxation.

(4) Assessment

All property shall be assessed at its true and fair value in money. In determining the true and fair value of real and personal property, the assessor shall value such property at such sum or price as he believes it to be fairly worth in money at the time such assessment is made. The assessed value of property shall be fixed with reference to the first day of October of each year.

(5) When Taxes Become Delinquent

All taxes are due and payable on the first day of October of each year, and if not paid on or before the 15th day of October of such year, are delinquent; provided, however, that if one-half of the amount of such taxes is paid on or before October 15, the remaining half shall not be deemed to be delinquent but may be paid at any time before the end of [63] March 31 of the following year.
on delinquent taxes.

(6) Discount

No discount is allowed.

(7) Penalty and Interest

A 10% penalty and 10% interest shall be charged on delinquent taxes.

(8) Lien Provisions

A lien for unpaid taxes attaches on the first day of October of the year of levy.

(9) Redemption

Ordinance No. 384 contains no provisions with respect to redemption of property sold for unpaid taxes.

(10) Personal Liability

Ordinance No. 384 contains no provisions with respect to imposition of any personal liability on a taxpayer for failure to pay taxes.

(11) Equalization

The Common Council of the City of Fairbanks shall equalize the assessment rolls each year. [64]

Tax Resolution of the Fairbanks Independent School District

Resolution of the Fairbanks Independent School District, passed and approved October 10, 1947, providing for the levy and collection of taxes and for the sale of property, both real and personal, for the payment of taxes, penalty, interest and costs.

(1) Rate of Tax

At a meeting of the Board held on September 15, 1949, a tax was levied at the rate of 10 mills for the year beginning October 1, 1949. No other taxes were levied for the year 1949. The rate of taxation for the year 1948 was 6 mills.

(2) Property Subject to Taxation

All property within the boundaries of the Fairbanks Independent School District located outside the corporate limits of the City of Fairbanks is subject to taxation for school purposes. The term "personal property" shall be considered to include all household goods, effects, furniture, chattels, wares, merchandise, gold dust, goods, money on deposit either within or without the school district corporation, boats or vessels owned or registered within the corporation, capital invested therein, all debts due or to become due from solvent debtors, either on account, contract, note, mortgage or otherwise, all public stocks or stocks or shares in incorporated companies, and all property of every nature and kind not included within the term "real property."

(3) Exemptions

The following property is exempt: All property belonging to the municipality or the Territory, all property exempt under the laws of the United States, and the household furniture of the head of the family or a householder, not [65] exceeding $200 in value, as well as all property used exclusively for religious, educational or charitable purposes and the property of any organization, not organized for business purposes, whose membership is composed entirely of veterans of any wars of the United States, or the property of the auxiliary of any such organization and all monies on deposit, provided that if any organization composed of veter-

ans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt.

(4) Assessment

The assessment shall be equal and uniform and shall be based upon the actual value of the property assessed.

(5) When Taxes Become Delinquent

All taxes shall be due and payable on the first day of October of the year of levy and delinquent on the 15th day of October of the same year, provided, however, that if one-half of the tax assessed is paid on or before the 15th day of October, the remaining one-half will not become delinquent until the first day of April of the year following. If one-half of the tax assessed is not paid on or before the 15th day of October, then the whole amount of the tax assessed will be delinquent.

(6) Discount

No discount is allowed by the Fairbanks Independent School District.

(7) Penalty and Interest

A penalty of 10%, together with interest at the rate of 6%, will be charged for delinquent taxes. [66]

(8) Lien Provisions

All taxes levied by the district shall constitute a

lien upon all of the property assessed, both real and personal, when the assessment is completed; and the lien for such taxes shall be enforced in accordance with the laws of the Territory of Alaska (§37-3-53 ACLA 1949) and pursuant to specific provisions contained in the property tax resolution of the District, which are as follows: After the taxes shall become due, the assessor shall make up a delinquent tax roll and said roll shall be filed with the assessor or tax collector and remain open to inspection by the public. As soon as convenient after completion of said delinquent tax roll, the assessor shall cause to be published in a newspaper of general circulation in the Fairbanks School District, once each week for a period of four successive weeks, a notice setting forth that the delinquent tax roll of real property has been completed and is open for public inspection and that on a date not less than 30 days after the completion of the said publication, the said roll will be presented to the District Court for the Fourth Judicial Division for judgment and order of sale. During the time of publication and up to the time of the order of sale, any person may appear and make payment of the taxes due, plus penalty and interest. After hearing, the order of sale may be made by the District Court; and after such order of sale has been made, the assessor or tax collector shall make such sale at public auction after notice by publication in a newspaper of general circulation once each week for 4 successive weeks or by posting in three public places in the City of Fairbanks. [67]

(9) Redemption

All real property sold for delinquent taxes shall be subject to redemption within a period of 2 years from the date of sale.

(10) Personal Liability

The owner of personal property assessed shall be personally liable for the amount of taxes assessed against his personal property, and such taxes, together with penalty and interest, may be collected after the same becomes due in a personal action brought in the name of the Fairbanks Independent School District against such owner in the courts of the Territory. The lien of personal property taxes may also be enforced by distraint and sale of the personal property of the person assessed.

(11) Equalization

The Board of Directors of the Fairbanks Independent School District shall sit as an equalization board on the 21, 22 and 23 days of September.

[Endorsed]: Filed August 14, 1950. [68]

[Title of District Court and Cause.]

Stipulation Re Reporter's Transcript of Evidence

It is hereby stipulated and agreed by and between Faulkner, Banfield and Boochever, attorneys for above named plaintiff and intervenor, and John H. Dimond, Assistant Attorney General, attorney for

defendant, M. P. Mullaney, that the following described exhibits, offered and admitted in evidence at the trial of this cause on the 15th day of May, 1950, (as shown on page 2 of the Reporter's Transcript of Record), are a portion of the said Reporter's Transcript of Record; that the same may be considered as having been read into evidence in full at the time they were so offered and admitted therein; that the hereto attached papers are true and correct copies of said exhibits and may be filed with the clerk of the above-entitled court without being transcribed by the reporter and filed with the Reporter's Transcript of Record; and that when so filed, the same may be copied by said clerk, together with other portions of the record in this case designated by the parties, and certified to the United States Court of Appeals for the Ninth Circuit as part of the record on appeal herein.

Intervenor's Exhibit No. 1, consisting of the deposition of J. A. Williams.

Plaintiff's and Intervenor's Exhibit No. 4, consisting of the affidavit of January 6, 1950, of Luther C. Hess.

Plaintiff's and Intervenor's Exhibit No. 10, consisting of the affidavit of May 12, 1950, of E. A. Tonseth.

Plaintiff's and Intervenor's Exhibit No. 13, consisting of the affidavit of May 12, 1950, of Roy P. Mathias.

Defendant's Exhibit No. 1A, consisting of deposition of James C. Ryan, together with defendant's exhibit No. 1 attached thereto.

Dated at Juneau, Alaska, this 9th day of August, 1950. [69]

FAULKNER, BANFIELD & BOOCHEVER,

MEDLEY & HAUGLAND,
CHARLES J. CLASBY,
Attorneys for Plaintiff and Intervenor.

J. GERALD WILLIAMS,
Attorney General of Alaska.

/s/ JOHN H. DIMOND,
Assistant Attorney General, Attorneys for Defendant, M. P. Mullaney. [70]

INTERVENOR'S EXHIBIT No. 1

Direct Interrogatories Propounded by Intervenor and Plaintiff to J. A. Williams a Witness for Intervenor and Plaintiff

Interrogatory No. 1

Q. Please state your name and address and occupation.

A. J. A. Williams, General Manager, Alaska Juneau Gold Mining Company, Juneau, Alaska.

Interrogatory No. 2

Q. If you have stated that you are General Manager of the Alaska Juneau Gold Mining Company's operations in the Territory, please state where these operations are carried on and in what business the company is engaged.

A. Gold mining and milling operations at Juneau, First Judicial Division, Alaska.

Interrogatory No. 3

Q. Does the Alaska Juneau Gold Mining Company, the intervenor, own real and personal property in the Territory of Alaska, and if so in which Judicial Division and in which taxing units?

A. Yes; in the First Judicial Division, in the cities of Juneau and Douglas and in the Juneau and Douglas Independent School Districts and in the territory outside those units.

Interrogatory No. 4

Q. State generally the nature of the real and personal property owned by the Alaska Juneau Gold Mining Company.

A. Lode mining claims and other real property, buildings, machinery, boats and watercraft, supplies, docks, transmission lines and mining and milling equipment, and power plants. [71]

Interrogatory No. 5

Q. Have various taxing units in the Territory of Alaska levied real and personal property taxes on

the property of Intervenor for the year 1949? If so, state which taxing units have levied these taxes.

A. Yes, the cities of Juneau and Douglas, the Juneau and Douglas Independent School Districts and the Territory itself.

Interrogatory No. 6

Q. Did the Intervenor make a return to the Defendant Tax Commissioner of real and personal property owned by it during the year 1949 in the Territory of Alaska outside of incorporated cities and school districts? A. Yes.

Interrogatory No. 7

Q. Where is that property situated, and of what does it generally consist?

A. In the First Judicial Division, Alaska, and consists of mining claims, power plant, transmission lines, buildings and personal property.

Interrogatory No. 8

Q. Was the return made by the Intervenor made under protest as alleged in the Complaint in Intervention? A. Yes.

Interrogatory No. 9

Q. Did you receive from the office of the Assessor in Division No. 1, Alaska, a notice of assessment of this property in the Territory outside of incorporated cities and school districts? A. Yes. [72]

Interrogatory No. 10

Q. If your answer to the last interrogatory is in the affirmative, please attach to the deposition and make a part hereof, such notices of assessment (marked Exhibit A) as the company received.

A. Attached and marked Exhibit A.

Interrogatory No. 11

Q. Has any part of the tax mentioned in that notice of assessment been paid? A. No.

Interrogatory No. 12

Q. Were any taxes levied in the year 1949 on the property of the Intervenor situated within the City of Juneau, Alaska? A. Yes.

Interrogatory No. 13

Q. If your answer to the last question is in the affirmative, will you please attach to this deposition and make a part thereof, the list of real and personal property of the Intervenor (marked Exhibit B) upon which taxes were levied and assessed in the year 1949 by the City of Juneau.

A. Attached and marked Exhibit B.

Interrogatory No. 14

Q. Will you please attach to these interrogatories and make a part hereof (Marked Exhibit C) all assessment notices, tax statements and receipts for taxes levied on the company's property within the City of Juneau, Alaska, for the year 1949?

A. Attached and marked Exhibit C. [73]

Interrogatory No. 15

Q. Have these taxes been paid to the City of Juneau by the Intervenor? A. Yes.

Interrogatory No. 16

Q. Were any taxes levied in the year 1949 on the property of the Intervenor situated within the City of Douglas, Alaska? A. Yes.

Interrogatory No. 17

Q. If your answer to the last question is in the affirmative, will you please attach to this deposition and make a part thereof, the list of real and personal property of the Intervenor (marked Exhibit D) upon which taxes were levied and assessed in the year 1949 by the City of Douglas?

A. Attached and marked Exhibit D.

Interrogatory No. 18

Q. Will you please attach to these interrogatories and make a part hereof (marked Exhibit E) all assessment notices, tax statements and receipts for taxes levied on the company's property within the City of Douglas, Alaska, for the year 1949?

A. Attached and marked Exhibit E.

Interrogatory No. 19

Q. Have these taxes been paid to the City of Douglas by the Intervenor? A. Yes.

Interrogatory No. 20

Q. Were any taxes levied in the year 1949 on the property of the Intervenor situated within the Juneau Independent School District? [74]

A. Yes.

Interrogatory No. 21

Q. If your answer to the last question is in the affirmative, will you please attach to this deposition and make a part thereof, the list of real and personal property of the Intervenor (marked Exhibit F) upon which taxes were levied and assessed in the year 1949 by the Juneau Independent School District?

A. Attached and marked Exhibit F.

Interrogatory No. 22

Q. Will you please attach to these interrogatories and make a part hereof (marked Exhibit G) all assessment notices, tax statements and receipts for taxes levied on the company's property within the Juneau Independent School District?

A. Attached and marked Exhibit G.

Interrogatory No. 23

Q. Have these taxes been paid to the Juneau Independent School District? A. Yes.

Interrogatory No. 24

Q. Were any taxes levied in the year 1949 on the property of the Intervenor situated within the

Douglas Independent School District?

A. Yes.

Interrogatory No. 25

Q. If your answer to the last question is in the affirmative, will you please attach to this deposition and make a part thereof, the list of real and personal property of the Intervenor (marked Exhibit H) upon which taxes were levied [75] and assessed in the year 1949 by the Douglas Independent School District?

A. Attached and marked Exhibit H.

Interrogatory No. 26

Q. Will you please attach to these interrogatories and make a part hereof (marked Exhibit I) all assessment notices, tax statements and receipts for taxes levied on the company's property within the Douglas Independent School District?

A. Attached and marked Exhibit I.

Interrogatory No. 27

Q. Have these taxes been paid to the Douglas Independent School District? A. Yes.

Interrogatory No. 28

Q. Have all the taxes which were levied and assessed against the City of Juneau, City of Douglas, Juneau Independent School District and the Douglas Independent School District been paid in full by the Intervenor for the year 1949?

A. Yes.

Interrogatory No. 29

Q. At what rate or rates were the taxes levied by the cities of Juneau and Douglas and the Juneau and Douglas Independent School Districts?

A. City of Juneau 20 mills; Douglas 15 mills; Juneau Independent School District 10 mills; Douglas Independent School District 10 mills; all less 2% discount for cash.

Interrogatory No. 30

Q. Did each of these taxing units, that is, the two cities and the two Independent School Districts, above mentioned, allow [76] a 2% discount for cash payment? A. Yes.

Interrogatory No. 31

Q. In addition to the taxes levied and assessed, as hereinabove mentioned in the preceding questions and answers, were there taxes levied on certain boats and watercraft of the Intervenor, Alaska Juneau Gold Mining Company, during the year 1949? A. Yes.

Interrogatory No. 32

Q. If you have answered the last interrogatory in the affirmative, please state what taxing unit levied the taxes on the vessels and watercraft.

A. Juneau Independent School District.

Interrogatory No. 33

Q. Do you have a statement from the Juneau

Independent School District showing the levy of these taxes with a statement of the different watercraft, the tonnage and the values placed on these various watercraft, and if so, will you please attach it to the deposition (marked Exhibit J) and make it a part hereof?

A. Attached and marked Exhibit J.

Interrogatory No. 34

Q. Are any of the mining claims, either patented or unpatented, belonging to the Intervenor which have been assessed for tax purposes, and against which taxes have been levied by any of the taxing units mentioned in previous interrogatories, including the Territory of Alaska, being operated, or are any of them producing anything at the present time, or have [77] they been so operating or producing at any time during 1949?

A. No.

Interrogatory No. 35

Q. Are any of the unpatented mining claims which are described in the assessment notice of the Territory of Alaska, sent you by the Tax Assessor, improved in any way?

A. Our unpatented claims which come under the School District tax rather than the Territorial property tax are nearly all unimproved; however, two or three claims have exploratory tunnels done for assessment work.

Interrogatory No. 36

Q. If any of them are so improved, are the improvements at the present time of any value or have they become useless?

A. Improvements where made are of no value except that they have served for assessment work.

Interrogatory No. 37

Q. Has demand been made upon the Intervenor for the payment of taxes levied and assessed by the Territory of Alaska for the year 1949?

A. Yes.

Interrogatory No. 38

Q. How long is it since the Alaska Juneau Gold Mining Company operated its mine and mill in Juneau; in other words, how long has the property been closed? A. Exactly six years.

/s/ J. A. WILLIAMS. [78]

PLAINTIFF'S AND INTERVENOR'S EXHIBIT No. 4

[Title of District Court and Cause.]

AFFIDAVIT OF LUTHER C. HESS

State of Arkansas,
County of Garland—ss.

I, the undersigned, Luther C. Hess, being first duly sworn, depose and say that I am the plaintiff named in the above-entitled cause and that I am a resident and inhabitant of the Territory of Alaska, Fourth Judicial Division, residing at Fairbanks,

and I have been a resident and inhabitant thereof for more than 25 years.

That I signed and swore to the complaint in the above-entitled cause and that all of the allegations contained therein are true, and they are re-alleged in this affidavit as though fully set forth herein.

That I have real and personal property in the Territory of Alaska in three different taxing units, as those are described in the Alaska Property Tax Act, Chapter 10, Session Laws of Alaska, 1949; and that some of this property is in the City of Fairbanks, a municipal corporation, some outside the City of Fairbanks in the Fairbanks School District, and some in the Fourth Judicial Division, Territory of Alaska, outside of any incorporated municipality, school district, or public utility district.

That certain taxes were levied on my property within the City of Fairbanks and the Fairbanks School District which have been paid, and the Commissioner of Taxation for the Territory of Alaska, one of the defendants hereinabove named, is about to demand the payment of a tax on my property described in the [79] complaint, which is situated in the territory outside of the City of Fairbanks and the Fairbanks School District; that the valuation placed upon this property is $58,213.46. Defendant M. P. Mullaney, as Commissioner of Taxation of Alaska, is preparing to collect a tax thereon of $580.13.

That no assessment roll has been made for the Territory of Alaska, Fourth Judicial Division, as provided by the Alaska Property Tax Act, but payment of the tax is required notwithstanding that

fact; that I have had no opportunity to appear before any board of equalization and for the reason that no property tax roll or assessment roll has been made as provided by law. I have had no opportunity to compare or equalize the assessment or valuation of my property with that of others who are similarly situated for the reason that there is no provision in the Alaska Property Tax Act for a Territorial Board of Equalization.

That if the tax on my property which is required under the act is not paid by February 1, 1950, my property will be subjected to foreclosure of a tax lien thereon and to sale without any provision for redemption.

That the tax levied by the Alaska Property Tax Act is void for the reasons set forth in the complaint, and I have no remedy at law, no remedy and no protection against the payment of this tax and no method for the removal of the cloud on the title of my property except through injunction of the above-entitled court.

Wherefore, affiant prays that pending the final trial of this cause on its merits, a preliminary injunction issue as prayed for in the complaint.

/s/ LUTHER C. HESS. [80]

Subscribed and sworn to before me this 6th day of January, 1950.

[Seal] /s/ T. M. DEERE,
Notary Public in and for the State of Arkansas, County of Garland.

My commission expires Feb. 1, 1951. [81]

PLAINTIFF'S AND INTERVENOR'S EXHIBIT No. 10

[Title of District Court and Cause.]

AFFIDAVIT OF E. A. TONSETH

United States of America,
Territory of Alaska—ss.

I, E. A. Tonseth, being first duly sworn, depose and say: That I am the City Clerk of the City of Fairbanks, Alaska, an incorporated city or municipality of the first class, and that I have custody of the city tax rolls and the records of the City of Fairbanks and of the school budget of the Fairbanks School District, which is an independent school district, comprising the City of Fairbanks, a municipal corporation, and adjacent territory.

That the total assessed value of real and personal property within the City of Fairbanks for the year 1949 upon which municipal taxes are levied was $16,060,624.00.

That the total school budget of the Fairbanks School District for the school year 1949-1950 is $210,575.50; that is the amount payable by the Fairbanks School District, which includes the City of Fairbanks, and of that amount $126,000.00 is the share of the City of Fairbanks and $84,575.50 is the share payable by the property in the Fair-

banks School District outside the City of Fairbanks, Alaska.

/s/ E. A. TONSETH.

Subscribed and sworn to before me this 12th day of May, 1950.

[Seal] /s/ MYRTLE L. BOWERS,
Notary Public in and for the Territory of Alaska.

My commission expires June 10, 1950. [82]

PLAINTIFF'S AND INTERVENOR'S EXHIBIT No. 13

[Title of District Court and Cause.]

AFFIDAVIT OF ROY P. MATHIAS

United States of America,
Territory of Alaska—ss.

I, the undersigned, Roy P. Mathias, being first duly sworn, depose and say: That I am the tax collector for the Fairbanks School District, and have access to the records thereof and to the records of assessment of all property within the Fairbanks School District outside the incorporated City of Fairbanks, Alaska. That the assessment rolls to date show the total assessed value of real and personal property within the Fairbanks School District, outside the City of Fairbanks, Alaska, to be at this time $13,532,279.00 for the year 1949. That this amount is the approximate total although the

assessment rolls have not been fully completed and there will be some additions and slight adjustments to be made in the assessment rolls.

/s/ ROY P. MATHIAS.

Subscribed and sworn to before me this 12th day of May, 1950.

[Seal] /s/ MYRTLE L. BOWERS,

Notary Public in and for the Territory of Alaska.

My commission expires June 10, 1950. [83]

DEFENDANT'S EXHIBIT No. 1-A

[Title of District Court and Cause.]

DEPOSITION OF JAMES C. RYAN, A WITNESS ON BEHALF OF DEFENDANT, M. P. MULLANEY

Be It Remembered, that the deposition of James C. Ryan, a witness called on behalf of defendant, was taken on the 6th day of April, 1950, beginning at 2:00 p.m., at Room 411-B, Federal Building, Juneau, Alaska, pursuant to stipulation to take deposition as hereto annexed, before Martha Wendling, a Notary Public. Norman C. Banfield, of Faulkner, Banfield and Boochever, of Juneau, Alaska, appeared on behalf of plaintiff and intervenors; J. Gerald Williams, Attorney General of Alaska, and John H. Dimond, Assistant Attorney General, appeared on behalf of defendant, M. P. Mullaney;

Whereupon, the witness, being by the Notary

first duly sworn, was examined and testified as follows:

JAMES C. RYAN

a witness called on behalf of defendant, M. P. Mullaney:

Direct Examination

By Mr. Dimond:

Q. Will you please state your name?

A. James C. Ryan.

Q. What is your profession?

A. Commissioner of Education for the Territory of Alaska.

Q. How long have you been so engaged as Commissioner?

A. About 9½ years; nine and some months.

Q. Briefly what are your duties as Commissioner of Education?

A. The duties are to keep all records pertaining to the schools of Alaska; to disburse monies appropriated by the Territory [84] for the use of public schools; to do all things necessary to encourage building, and operate public schools and to directly operate the rural schools of the Territory.

Q. Will you please give a general description of the school system of the Territory?

A. The over-all school system of Alaska is operated by a board known as the Territorial Board, which is appointed by the Governor and confirmed by the Legislature. There are five members, one from each judicial division and one at large. The

schools are in two general classes, rural schools that are operated 100% by the Territory and incorporated school districts that are operated jointly by the Territory and the local people of the district. There are three different types of incorporated school districts in Alaska. One type is what we call the city type where the schoool district is just as large as the boundaries of the city. The second type is the independent school district which embraces the municipality and its adjacent area not to exceed 500 square miles. The third type is the incorporated school district where a settlement or a village and its adjacent area may incorporate as a school district, but it does not include a municipality.

Q. Are these three types of school districts commonly called incorporated?

A. Yes, they are commonly called incorporated school districts.

Q. And they include a type of school district called an incorporated school district?

A. Yes. It is a little confusing in that respect because one of them is called an incorporated school district which is a [85] specific type, yet they are all organized school districts or incorporated school districts.

Q. I hand you these books, Dr. Ryan. Will you please state what they are?

A. These are the reports of the Commissioner of Education for the biennium ending June 30, 1936, 1938, 1940, 1942, 1944, 1946, 1948.

Q. Are these reports required to be kept by law?

A. Yes, it is required by law that the Commis-

sioner of Education report once each biennium.

Q. What, briefly, do those reports contain?

A. They contain the activities of the Territorial Department of Education and of the Territorial Board of Education and something of the statistics of the public school system concerning enrollments and the expenditures of the Territory for various school purposes.

Q. I now hand you this paper. Will you please state what this is?

A. This is a distribution of expenses for the years 1934 through 1948—just what it says on the front here—the number of incorporated school districts and the unincorporated schools, with a total expense for each of these two types, and the portion of the total expense paid from territorial funds, the portion paid from funds raised by local taxes within the district, and the enrollment of pupils in each of the two types of schools.

Q. Did you prepare this? A. Yes.

Q. From what source did you obtain these figures? [86]

A. The source of this material was from information on file in my office. The official records chiefly are compiled in these reports.

Q. Reports of the Commissioner of Education which you have just previously identified?

A. Yes.

Q. This is a summary of certain statistics taken from those reports? A. That is right, sir.

Q. I observe that you have unincorporated

schools, rural schools and special schools; can you tell me what a special school is?

A. Yes. The Territorial Board of Education has, by regulation, determined the manner in which certain rural schools shall be established. Schools that are very small, where they have just a minimum number for the establishment of a school—for a number of years that was six—we establish what is known as a special school. The distinguishing feature there was that the local community would provide certain things in the operation of the school, whereas in a larger rural school all of it was provided by the Territory. For example, if a community had just six pupils, we would establish a school if the local community would provide the fuel, the light and the janitor service, while the Territory then provided the teacher and the textbooks and all the other expenses of the operation. For quite a number of years that was carried on our books and in our records as special schools, but I believe somewhere about 1943 or 1944 we discontinued that practice and you will note from the [87] biennial report it no longer appears; it just appears as territorial schools.

Q. What proportion of the total expense for the support of rural and special schools is paid by the people in the special school districts by way of fuel, light and janitor service? Is it a large amount?

A. No, it is a very small amount. To give you an example, in a little school of six or seven pupils the community would provide the fuel, which would amount to about ten cords of wood, and that

running about as it would at that time—about $10—it varies in amount—it would be maybe $150. Many times the men of the community actually cut the wood and brought it in so it would not amount to too much.

Q. The other expenses of the special schools are borne by the Territory?

A. That is right; all the other expenses—text-books, supplies, teachers' salaries, etc.

Q. Would counsel be willing to stipulate that this last exhibit identified by the witness can be offered in evidence at the trial of this case without the necessity of any further identification?

Mr. Banfield: Yes, it may be offered without any further identification, but at that time we reserve the right to object to its admissibility on other grounds.

Mr. Dimond: Very well. I would like to have the Notary mark this exhibit "Defendant's Exhibit No. I" and attach it to the deposition to be sent to the Clerk of the Court at Fairbanks. [88]

(The Notary then proceeded to mark the exhibit according to the instructions of counsel.)

Mr. Dimond: Would you also be willing to stipulate that the reports of the Commissioner of Education previously identified by the witness could, if desired by either party, be offered in evidence, in whole or in part, without the necessity of further identification, subject, of course,——

Mr. Banfield: Yes, I will so stipulate, subject, of course, to other objections as to their admissibility.

Mr. Dimond: I would like to have the Notary mark each one of those reports of the Commissioner of Education "Defendant's Exhibit No. II." I believe there are seven of the books, and to distinguish between them, each one should be marked "Part 1," "Part 2," "Part 3" through 7, and each should contain the words "Defendants Exhibit No. II."

(The Notary then proceeded to mark the exhibits according to the instructions of counsel.)

Q. What are the items of expense of incorporated school districts which are not borne by territorial funds—not paid from territorial funds?

A. Chiefly capital expenditures, although it does not follow always that the usual interpretation of capital expenditures is the same as that used in ordinary common usage. The local district is responsible 100% for construction of the [89] building, the repair of the building; they are responsible 100% for equipment in the building. It is there that the difference in the Territorial Board's interpretation and that of common practice breaks down. In general practice, a typewriter that is a replacement is usually regarded as a current expense, while a new typewriter, a brand new one added, is a capital expenditure. Any typewriter where it is a replacement or any school desk where it is a replacement is an expense of the local school district and is counted as an expenditure by the school board. In addition to that, the local district bears a portion of the cost of the operation of the school, depending upon the size of the school. Territorial

law provides that schools with 150 or fewer pupils get 85% of their current operation cost borne by the Territory and 15% must be borne by the local community. If the school has an enrollment of 150 to 300, the local community bears 20% and the Territory 80%. If the enrollment is over 300, the local community bears 25% of the current operation cost and the Territory 75%.

Q. Dr. Ryan, in the case of a school which would receive 80% support from the territorial government by way of refund, why is it that under this exhibit the percentage is shown as approximately 66%?

A. There is a very good reason for that. The Territory pays 80% of teachers' salaries, for example, based upon the territorial minimum salary scale, while the local community bears their 20% of that minimum scale plus 100% of all of the amount which they pay above the minimum scale, and most of the districts do pay above the minimum scale, and that [90] accounts for that difference. The Territory does pay 80% of the minimum scale, but for the over-all expenditure of teachers' salaries it would not be 80% because the local community pays above the minimum scale.

Q. With regard to pupils attending schools within incorporated school districts but residing outside of the district, who pays the cost of their tuition? A. The Territory.

Q. The Territory pays it to the school district?

A. Pays it to the school district.

Q. How is the cost of transportation of pupils to schools paid? A. By the Territory 100%.

Q. Even pupils attending school district schools?

A. Yes.

Q. I am not sure whether I asked you this, but going back to rural schools, are the capital expenditures of those schools paid by the Territory of Alaska?

A. Yes. The expense of the operation of rural schools is borne 100%. The current expense, the capital expenditure, everything is borne by the Territory—those outside of any incorporated school district—there I am using incorporated school district in its broad sense.

Mr. Dimond: No further questions.

Mr. Banfield: No questions by the plaintiff or intervenor.

(Witness excused.)

Signature of Witness:

/s/ JAMES C. RYAN. [91]

Certificate

United States of America,
Territory of Alaska—ss.

I, Martha Wendling, Notary Public in and for the Territory of Alaska, residing at Juneau, Alaska, do hereby certify:

That the annexed and foregoing deposition of James C. Ryan, a witness called on behalf of the defendant, M. P. Mullaney, was taken before me on the 6th day of April, 1950, beginning at 2:00 p.m., at Room 411-B, Federal Building, Juneau, Alaska, pursuant to stipulation to take deposition as heretofore annexed;

That the above-named witness, before examination, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

That this deposition, as heretofore annexed, is a full, true, and correct transcription of all of the testimony of said witness, including questions and answers and objections of counsel;

That in compliance with the request of counsel for defendant, I marked Defendant's Exhibits I and II in the manner directed by counsel, and have attached said exhibits to this deposition;

That this deposition has been retained by me for the purpose of sealing up and directing the same to the Clerk of the Court, Fairbanks, Alaska, as required by law.

In Witness Whereof, I have hereunto set my hand and affixed my seal this 7th day of April, 1950.

[Seal] /s/ MARTHA WENDLING,
Notary Public for Alaska.

My Commission expires November 1, 1950. [92]

Defendant's Exhibit I

Showing, for the years 1934 through 1948, the number of Incorporated School Districts and Unincorporated Schools in Alaska; the total expenses for each of these two types of schools; the portion of the total expenses which is paid from Territorial funds; the portion which is paid from funds raised by local taxes within the districts; and the enrollment of pupils in each of the two types of schools.

	School Years						
I. Incorporated School Districts (Consisting of City Schools, Incorporated School Districts, and Independent School Districts.)	1934-1935	1935-1936	1936-1937	1937-1938	1938-1939	1939-1940	1940-1941
1. Number	17	17	17	17	18	18	18
2. Total Expenses (exclusive of capital outlay)	$393,008	$414,404	$436,955	$452,054	$477,387	$543,880	$573,032
a. Amount paid from Territorial funds	274,184	293,609	308,598	299,227	321,477	351,512	371,953
b. Amount paid from funds raised by local taxes in districts	118,824	120,795	128,357	152,827	155,910	192,368	201,079
c. Percentage paid from funds raised by local taxes in districts (%)	30.2	29.2	29.4	33.8	32.7	35.4	35.4
3. Enrollment (average daily attendance)	3,332	3,398	3,524	3,533	3,764	3,923	4,052
II. Unincorporated Schools (Consisting of Rural or Village Schools and Special Schools.)							
1. Number	74	76	72	68	64	53	55
2. Total Expenses (exclusive of capital outlay)	$190,502	$228,393	$249,598	$252,050	$251,068	$244,564	$211,627
a. Amount paid from Territorial funds	190,502	228,393	249,598	252,050	251,068	244,564	211,627
b. Amount paid from funds raised by local taxes	none	none	none	none	none	none	none
c. Percentage paid from funds raised by local taxes	none	none	none	none	none	none	none
3. Enrollment (average daily attendance)	1,441	1,687	1,765	1,702	1,744	1,335	1,424

	School Years						
I. Incorporated School Districts	1941-1942	1942-1943	1943-1944	1944-1945	1945-1946	1946-1947	1947-1948
(Consisting of City Schools, Incorporated School Districts, and Independent School Districts.)							
1. Number	18	17	18	18	21	22	23
2. Total Expenses (exclusive of capital outlay)	$620,578	$635,108	$756,851	$828,925	$982,301	$1,230,430	$1,718,254
a. Amount paid from Territorial funds	392,020	391,125	508,113	537,097	619,347	868,496	1,182,767
b. Amount paid from funds raised by local taxes in districts	228,558	243,983	248,738	291,828	362,954	361,934	535,487
c. Percentage paid from funds raised by local taxes in districts (%)	36.8	38.4	32.9	35.2	37.0	29.4	31.1
3. Enrollment (average daily attendance)	4,202	3,615	4,069	4,473	5,100	5,785	6,557
II. Unincorporated Schools							
(Consisting of Rural or Village Schools and Special Schools.)							
1. Number	55	46	44	38	45	50	55
2. Total Expenses (exclusive of capital outlay)	$192,249	$218,325	$249,087	$271,861	$289,931	$ 357,885	$ 479,840
a. Amount paid from Territorial funds	192,249	218,325	249,087	271,861	289,931	357,885	479,840
b. Amount paid from funds raised by local taxes	none	none	none	none	none	none	none
c. Percentage paid from funds raised by local taxes	none	none	none	none	none	none	none
3. Enrollment (average daily attendance)	1,236	982	1,043	1,140	1,181	1,343	1,822

Summary — 1934–1948

		Incorporated School Districts	Unincorporated Schools
1.	Average number per school year.....	18	56
2.	Enrollment—avg. daily attendance..	4,327	1,423
3.	Total expenses (exclusive of capital outlay)	$10,063,167	$3,686,980
4.	Amount of total expenses paid from Territorial funds	6,719,525	3,686,980
5.	Amount of total expenses paid from funds raised by local taxes in districts	3,343,642	none
6.	Percentage of total expenses paid from funds raised by the local taxes in districts	33.2%	none

[Endorsed]: Filed August 14, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED ON BY APPELLANT

Appellant, M. P. Mullaney, proposes on his appeal to the United States Court of Appeals for the Ninth Circuit, to rely upon the following points as error:

I.

The Court erred in holding that the tax levied by Chapter 10, Session Laws of Alaska, 1949, is invalid as not being valued and uniform as required by Section 9 of the Organic Act of the Territory of Alaska. This holding was error because the classification between (1) property within incorporated towns and cities, incorporated school districts, and independent school districts, and (2) property in territory outside of such municipalities and districts, adopted by the Territorial Legislature in Chapter 10, Session Laws of Alaska, 1949, is based upon grounds having a rational relation to a legitimate end of governmental action and a permissible policy of taxation, and, therefore, satisfies standards of equality demanded by the Equal Protection Clause of the 14th Amendment to the Constitution of the United States, such standards being the same as those demanded by the Uniformity Clause of Section 9 of the Organic Act of Alaska.

II.

The Court erred in holding that the tax levied under Chapter 10, Session Laws of Alaska, 1949, is invalid as being a taking of property without due

process of law, forbidden by the 5th Amendment to the Constitution of the United States. This holding was error, for if the legislative scheme of classification in said Chapter 10 satisfies standards of equal protection demanded by the 14th Amendment to the Constitution of the United States, there necessarily is no deprivation of property without due process of law. [142]

III.

The Court erred in holding that the tax levied by Chapter 10, Session Laws of Alaska, 1949, upon unimproved, unpatented mining claims which are not producing and upon unimproved non-producing patented mining claims upon which the improvements originally required for patent have become useless through deterioration, removal or otherwise, is contrary to Section 9 of the Organic Act of Alaska, as amended by the Act of Congress of June 3, 1948, and is, therefore, invalid as not valuing such claims according to their true and full value, nor at the price paid the United States therefor, nor at a flat rate fixed by the Legislature. This holding was error, for if Congress with its plenary power to legislate for the Territory of Alaska has the right to provide in Section 9 of the Organic Act that taxes shall be assessed according to full and true value, it necessarily has the power and authority to modify this portion of Section 9 by providing that taxes on such mining claims need not be assessed according to full and true value, but may be assessed at either the price paid the United States therefor or at a

flat rate fixed by the Legislature. The Territorial Legislature in Chapter 10, Session Laws of Alaska, 1949, chose the latter alternative granted by Congress by valuing such mining claims at a flat rate of $500.00 per each 20 acres or fraction of each such claim.

IV.

The Court erred in holding that the last sentence in Section 11 of Chapter 10, Session Laws of Alaska, 1949, which provides "the true value of property shall be that value at which the property would generally be taken in payment of a just debt from a solvent debtor" is invalid as being contrary to [143] the provisions of Section 9 of the Organic Act of Alaska. This holding was error since the provision of Section 9 of the Organic Act of Alaska that "the assessment shall be according to the true and full value" has for its purpose equality of burden in taxation, and such objective is not thwarted when the Legislature specifies what facts and circumstances are to be considered in determining the assessable value of property for purposes of taxation as long as the same method is applied to all within a classification that is legitimate.

V.

The Court erred in holding that appellees have no adequate remedy at law, and that the enforcement of Chapter 10, Session Laws of Alaska, 1949, would have resulted in irreparable injury to appellees, and that the bringing of this action prevented a multiplicity of actions.

VI.

The Court erred in holding that the liens impressed by the tax levied under Chapter 10, Session Laws of Alaska, 1949, upon the properties of appellees situated in the Territory outside of municipalities, independent and incorporated school districts, and public utility districts, constitute a cloud on the titles of appellees to such properties which they are legally entitled to have removed in a court of equity. This holding was error since appellees, under the provisions of §48-7-1, Alaska Compiled Laws Annotated, 1949, have an adequate remedy at law.

VII.

The Court erred in making and entering its Conclusion of Law No. VII, which reads as follows: "That the temporary injunction heretofore issued in this cause restraining the [144] defendant M. P. Mullaney, Commissioner of Taxation, and his agents, deputies, official representatives, and all persons acting under him, from enforcing the provisions of Chapter 10, Session Laws of Alaska, 1949, against the property (other than boats and vessels) of plaintiff and intervenor herein, should be made permanent and the bonds given pursuant to the requirements of the preliminary injunction exonerated and the sureties thereon discharged."

VIII.

The Court erred in entering Judgment and Decree in favor of appellees and permanently enjoining appellant from collecting or attempting to collect

from appellees the tax imposed by Chapter 10, Session Laws of Alaska, 1949, upon property owned by them in the Territory of Alaska outside of municipalities and independent and incorporated school districts.

Dated at Juneau, Alaska, this 10th day of August, 1950.

J. GERALD WILLIAMS,
Attorney General of Alaska,

By JOHN H. DIMOND,
Assistant Attorney General, Attorneys for Defendant-Appellant, M. P. Mullaney.

Receipt of copy acknowledged.

[Endorsed]: Filed August 14, 1950. [145]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD AND PROCEEDINGS TO BE INCLUDED IN THE RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in the above-entitled cause, and to include in such transcript of record the following papers and records which appellant, M. P. Mullaney, herewith

designates as those portions of the record and proceedings herein which he deems should be contained in the record on appeal of this cause:

1. Plaintiff's complaint for injunction and other relief.

2. Complaint in intervention.

3. Order permitting intervention.

4. Amended answer of defendant, M. P. Mullaney, to plaintiff's complaint.

5. Amended answer of defendant, M. P. Mullaney, to complaint in intervention.

6. Preliminary injunction.

6-a. Stipulation re Introduction of Evidence at trial, 2/6/50.

7. Stipulation re summary of evidence, with summaries of plaintiff's and intervenor's exhibits Nos. 5, 6, 7, 8, 9, 11, 12 and 14 attached.

8. Stipulation re reporter's transcript of record, with intervenor's exhibit No. 1, plaintiff's and intervenor's exhibits Nos. 4, 10 and 13, and defendant's exhibits Nos. 1A and I attached.

9. Affidavit of January 24, 1950, of M. P. Mullaney.

10. Reporter's transcript of record.

11. Opinion of court.

12. Findings of fact and conclusions of law.

13. Amended judgment and decree.

14. Notice of appeal. [146]

15. Statement of points relied on by appellant.

16. This designation of portions of record and proceedings to be included in the record on appeal.

17. Stipulation re Printing of record.

Dated at Juneau, Alaska, this 10th day of August, 1950.

J. GERALD WILLIAMS,
Attorney General of Alaska.

By /s/ JOHN H. DIMOND,
Assistant Attorney General, Attorneys for Defendant-Appellant, M. P. Mullaney.

Receipt of copy acknowledged.

[Endorsed]: Filed August 14, 1950. [147]

[Title of District Court and Cause.]

STIPULATION RE PRINTING OF RECORD

It is hereby stipulated and agreed by and between Faulkner, Banfield and Boochever, attorneys for plaintiff and intervenor above named, and John H. Dimond, Assistant Attorney General, attorney for defendant, M. P. Mullaney, that in printing the papers and records to be used in the hearing on appeal in the above-entitled cause before the United States Court of Appeals for the Ninth Circuit, the title of

the court and cause in full shall be omitted from all papers except on the first page of the record, and that there shall be inserted in place of the title on all papers used as part of the record the words "Title of District Court and Cause"; also that all endorsements on all papers used as a part of the record may be omitted except the clerk's filing marks and admissions of service.

Dated at Juneau, Alaska, this 10th day of August, 1950.

MEDLEY AND HAUGLAND,
FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ H. L. FAULKNER,

/s/ CHARLES J. CLASBY,
Attorneys for Plaintiff and
Intervenor.

/s/ JOHN H. DIMOND,
Of Attorneys for Defendant,
M. P. Mullaney.

[Endorsed]: Filed August 14, 1950. [148]

[Title of District Court and Cause.]

TRANSCRIPT OF RECORD

Be it remembered that upon this 15th day of May, 1950, the above-entitled cause came on regularly before the Honorable Harry E. Pratt, District Judge,

for trial upon plaintiff's complaint, as amended by interlineation; the answer of defendants, Fairbanks School District and the Officers thereof; the answer of the defendant, City of Fairbanks; the answer of the defendant M. P. Mullaney; the complaint in intervention; and the answers of the above-mentioned defendants thereto.

The plaintiff appeared by H. L. Faulkner, Medley & Haugland, and Charles J. Clasby of Collins & Clasby; the intervenor appeared by Faulkner, Banfield & Boochever; the defendants M. P. Mullaney and William Liese appeared by J. Gerald Williams, Attorney General of Alaska, and J. H. Dimond, Assistant Attorney General of Alaska; the defendant, City of Fairbanks, appeared by Mike Stepovich; and the defendants Fairbanks School District and officers, appeared by Maurice T. Johnson.

The Following Proceedings Were Had:

Mr. Faulkner: If the Court please, before we begin this [100] morning I would like to ask leave to make a slight amendment to the complaint in intervention on page three where we list the property of the Alaska Juneau Gold Mining Company, and insert at the end of the description of the property, "boats and water craft, $291.00." At the time we listed the property that was omitted for some reason. I understand Mr. Dimond has no objection to that.

The following documents and affidavits are offered in evidence: Certificate of Compliance of Intervenor, certified by Clerk of District Court, Division 1; Certificate of Compliance of Intervenor certified

by Auditor of Alaska; Affidavit of January 6, 1950, of Luther C. Hess; Affidavit of January 9, 1950, of C. L. Popejoy to which is attached a copy of the tax ordinance of the City of Juneau and excerpts from minutes of meeting of October 21, 1949, of the Common Council of the City of Juneau; Affidavit of January 9, 1950, of Mrs. Daniel D. Livie to which are attached the tax ordinance of the Juneau Independent School District and extracts of minutes of special meeting of August 19, 1949, of the Board of Directors of the Juneau Independent School District; Affidavit of May 4, 1950, of Mrs. Daniel D. Livie; Affidavit of January 9, 1950, of Celia A. Wellington to which are attached the tax ordinance of the Douglas Independent School District and extract from minutes of meeting of October 5, 1949, of the Board of Directors of the Douglas Independent School District; Affidavit of January 9, 1950, of A. J. Balog to which are attached the tax ordinance of the City of Douglas and minutes of meeting of September 12, 1949, of the Common Council of the City of Douglas.

Judge Pratt: The offers are admitted.

Mr. Faulkner: The deposition of J. A. Williams —we haven't introduced that as yet. Does the Court want that read at [101] this time?

Judge Pratt: Can you state the substance of it?

Mr. Faulkner: Yes. (reads). (Continuing offers) Affidavit of January 17, 1950, of E. A. Tonseth to which is attached the tax ordinance of the City of Fairbanks; Resolutions of the Common Council of the City of Fairbanks of September 26, 1949, and October 10, 1949; Affidavit of January 17, 1950, of

Frank Conway to which are attached three resolutions of the Fairbanks Independent School District; and the following affidavits were filed this morning, filed by stipulation: Affidavit of May 12, 1950, of E. A. Tonseth, Clerk of the City of Fairbanks; Affidavit of May 12, 1950, of Roy P. Mathias, Tax Collector of Fairbanks School District. I think those are all of the documents. When Attorney General Williams comes to his case I think he has an affidavit too. Now, I would like to call for one question, Mr. Hess, the plaintiff. The only reason for calling Mr. Hess is the assessment and since then that has been changed by increasing it ten thousand dollars, and I would like to have that in the record.

LUTHER C. HESS

plaintiff, being first duly sworn, testified as follows:

By Mr. Faulkner:

Q. Mr. Hess, in your complaint you alleged that you had certain property outside of the City of Fairbanks upon which the value had been placed at $58,-213.46, and that a tax was levied on that—$580.13. Now, has that been changed since this complaint was filed:

A. Those figures were on the value that I placed as I interpreted the law and the values have been changed by the assessor. I don't remember the exact sum just now but about ten thousand dollars more.

Q. About $10,000.00, and that would increase the tax about [102] $100.00? A. Yes, sir.

Q. I think that is all. I would like to call Mr. William Liese, the Tax Assessor, for one question.

WILLIAM K. LIESE

being first duly sworn, testified as follows:

By Mr. Faulkner:

Q. Mr. Liese, will you please state your name?

A. William K. Liese.

Q. Your position?

A. I am the Tax Assessor for the Fourth Division.

Q. As Assessor for the Fourth Division, have you brought with you the total value of taxable property, real and personal, in the Fourth Division, outside of Municipal and School Districts?

A. I have the total value of the property that is assessed but the figure is not complete, that is, on the property to be assessed.

Q. What is the value today?

A. The property that has been assessed, covering the total property to date, real and personal, is $11,380,798.30.

Q. Mr. Liese, how many municipal and school districts are there in the Fourth Division?

A. There are three municipalities and one independent school district.

Q. The independent school district, is the one that comprises the City of Fairbanks?

A. I think that is right.

Mr. Faulkner: If the Court please, Mr. Clasby has called my attention to the fact we want to be careful about the deposition of Mr. Williams—to be sure it is read. [103]

Attorney General Williams: Does it have a number?

(The Stipulation to take the Deposition of J. A. Williams, and the attached deposition with attached exhibits, were received in evidence and marked by the Clerk of the Court as Intervenor's Exhibit No. 1.)

Mr. Faulkner: It is numbered as an exhibit. I just want to record it as having been read.

Judge Pratt: We can show that it is introduced as an exhibit.

Mr. Faulkner: I believe that is all the evidence we have. We have all the evidence before the Court that we wish considered.

Attorney General Williams: Your Honor, for my knowledge is it before the Court now that the tax has been changed from ten mills to seven mills?

Judge Pratt: You want to change that back to ten?

Attorney General Williams: It should be changed back to ten, that is right.

Mr. Faulkner: On page four, paragraph five, we struck out ten and put in seven.

Judge Pratt (To Clerk of the Court): Strike out the seven and put back the ten.

Mr. Dimond: If the Court please, we have no opening statement to make. Our evidence consists only of the deposition of James C. Ryan of Juneau.

Judge Pratt: Stipulation as given may be so considered.

Mr. Dimond: Did that apply also to the two exhibits?

Judge Pratt: Oh, yes, didn't you want that marked as an exhibit?

Mr. Dimond: Yes, I believe the deposition should also be marked as an exhibit. [104]

(The Stipulation to take the Deposition of James C. Ryan, and the attached deposition with attached exhibits, were received in evidence and marked by the Clerk of the Court as Defendant's Exhibit No. 1-A.)

Mr. Dimond: That is all we have, your Honor.

CERTIFICATE OF REPORTER

United States of America,
Territory of Alaska—ss.

I, Lois Farris, the official Court Reporter for the District Court, District of Alaska, Fourth Division, during the period of the trial of the above-entitled cause do hereby certify as follows, to wit: that I attended the trial of the above-entitled cause on May 15, 1950, at Fairbanks, Alaska, and took down in shorthand all of the oral proceeding and oral testimony given thereat; that the above and foregoing pages one to six, inclusive, constitute a full, true and correct transcript of my said shorthand record of said oral testimony and oral proceedings at said trial; that written stipulations and affidavits, notices, depositions, pleadings or any other writing made a part of the proceedings by such stipulations of the parties

or attorneys filed herein are not included in said preceding six pages of this transcript.

Done at Fairbanks, Alaska, this 22nd day of July, 1950.

/s/ LOIS FARRIS,
Official Court Reporter
For the Aforesaid Court.

[Endorsed]: Filed August 21, 1950. [106]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all Pleadings, Motions, and Orders as per designation of Record filed by Appellant in the above-entitled cause, viz.:

Complaint for Injunction and Other Relief; Complaint in Intervention; Order Permitting Intervention; Amended Answer of Defendant M. P. Mullaney to Plaintiff's Complaint; Amended Answer of Defendant M. P. Mullaney to Complaint in Intervention; Preliminary Injunction; Stipulation Re Introduction of Evidence at Trial; Stipulation Re Summary of Evidence; Stipulation Re Reporter's Transcript of Evidence; Affidavit of Defendant M. P. Mullaney, Commissioner of Taxation; Transcript of Record and Certificate of Court Reporter; Opinion; Findings of Fact and Conclusions of Law; Amended Judgment and Decree; Notice of Appeal; Statement

of Points to Be Relied on by Appellant; Designation of Portions of Record and Proceedings to Be Included in the Record on Appeal; Stipulation Re Printing of Record.

Witness my hand and the seal of the above-entitled Court this 5th day of September, 1950.

[Seal] /s/ JOHN B. HALL,
Clerk of the District Court, Fourth Judicial Division, Territory of Alaska.

[Endorsed]: No. 12675. United States Court of Appeals for the Ninth Circuit. M. P. Mullaney, Commissioner of Taxation, Territory of Alaska, Appellant, vs. Luther C. Hess and Alaska Juneau Gold Mining Company, a corporation, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Fourth Division.

Filed September 7, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12675

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,

Appellant,

vs.

LUTHER C. HESS and ALASKA JUNEAU GOLD MINING CO., a Corporation,

Appellees.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Comes now appellant above named and adopts the Statement of Points to be Relied on by Appellant, filed with the clerk of the district court, as his statement of points to be relied upon in the United States Court of Appeals, and prays that the whole of the record as filed and certified be printed.

Dated at Juneau, Alaska, this 10th day of August, 1950.

J. GERALD WILLIAMS,
Attorney General of Alaska.

By /s/ JOHN H. DIMOND,
Assistant Attorney General,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 7, 1950.

No. 12675

In The United States
COURT OF APPEALS
For the Ninth Circuit

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,

Appellant,

v.

LUTHER C. HESS and ALASKA JUNEAU GOLD MINING CO., a corporation,

Appellees.

Upon Appeal from the District Court for the Territory of Alaska, Fourth Division

BRIEF FOR APPELLANT

J. GERALD WILLIAMS
Attorney General of Alaska
JOHN H. DIMOND
Assistant Attorney General
Juneau, Alaska
For Appellant.

No. 12675

In The United States
COURT OF APPEALS
For the Ninth Circuit

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,

Appellant,

v.

LUTHER C. HESS and ALASKA JUNEAU GOLD MINING CO., a corporation,

Appellees.

Upon Appeal from the District Court for the Territory of Alaska, Fourth Division

BRIEF FOR APPELLANT

J. GERALD WILLIAMS
Attorney General of Alaska

JOHN H. DIMOND
Assistant Attorney General

Juneau, Alaska

For Appellant.

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Specifications of Error	4
Summary of Argument	7
Argument	
I. The Alaska Property Tax Act, Chapter 10, Session Laws of Alaska, 1949, is a valid Act and does not contravene the uniformity clause of Section 9 of the Alaska Organic Act	12
A. The Standards of uniformity and equality demanded by Section 9 of the Alaska Organic Act and by the equal protection clause of the Fourteenth Amendment are essentially the same	12
B. The legislature had adopted a broad classification in the Act which fully satisfies standards of equality and uniformity	16
C. The fact that the property tax ordinances of the various municipalities and school districts in the Territory are not identical does not invalidate the Act	25
D. Appellees have not been the victims of any unconstitutional discrimination	27

Page

E. The procedure for determining assessable values as set forth in Section 11 of the Act does not violate uniformity requirements and is therefore valid 29

II. The provisions for the taxation of mining claims pursuant to Section 3 of Chapter 10, Session Laws of Alaska, 1949, are not invalid 31

III. The issuance of the injunction restraining the enforcement of Chapter 10, Session Laws of Alaska, 1949, was not justified since appellees have not shown those special and extraordinary circumstances necessary to bring this case under any of the recognized heads of equity jurisdiction 34

Conclusion 41

Appendices 43

CITATIONS

Cases

Adams Express Co. v. Ohio State Auditors, 165 U. S. 194 14

Aero Transit Co. v. Georgia Comm'n., 295 U. S. 285 20

Alaska Fish Co. v. Smith, 255 U. S. 44 14

Alaska Steamship Co. v. Mullaney, 180 F(2) 805 .....8, 12, 14, 16

Ashwander v. Tenn. Valley Authority, 297 U. S. 288 38

Page

Binns v. United States, 194 U. S. 486 33

Carmichael v. Southern Coal Co., 301 U. S. 495 .....20, 22, 26

Casco County v. Thurston County, 163 Wash. 666, 2 P.(2) 677 36

Charleston Assn. v. Alderson, 324 U. S. 182 .... 10, 31

City Council of Augusta, Ga. v. Timmerman, 233 F. 216 40

Colgate v. Harvey, 296 U. S. 404 20

Corporation Commission v. Lowe, 281 U. S. 431 33

Dodge v. Osborn, 240 U. S. 118 ..... 12, 40

Douglas v. Jeannette, 319 U. S. 157 39

Educational Films Corp. v. Ward, 282 U. S. 379 37

Electric Bond Co. v. Commission, 303 U. S. 419 10, 34

Equitable Life Assurance Society v. Brown, 213 U. S. 25 36

Featherstone v. Norman, 170 Ga. 370, 153 S. E. 58 26

Foster v. Pryor, 189 U. S. 325 23

Fox v. Standard Oil Co., 294 U. S. 87 .....13, 16, 25

General American Tank Car Corp. v. Day, 270 U. S. 367 ..... 22, 29

Greene v. Louisville & I. R. Co., 244 U. S. 499 24, 30

Heisler v. Thomas Colliery Co., 274 Pa. 448, 118 Atl. 394 15

Huston v. Iowa Soap Co., 85 F(2) 649, cert. denied, 299 U. S. 594 36

Kentucky Railroad Tax Cases, 115 U. S. 321 23

Page

Lake Superior Consolidated Iron Mines v. Lord, 271 U. S. 577 13

Lawrence v. State Tax Commission, 286 U. S. 276 21

Lelande v. Lowery, 26 Cal.(2) 224, 157 P.(2) 639 15

Louisiana v. Pilsbury, 105 U. S. 278 ..... 26, 28

Madden v. Kentucky, 309 U. S. 83 ..... 14, 18

Magoun v. Ill. Trust & Savings Bank, 170 U. S. 283 27

Manning v. Sims, 308 Ky. 587, 213 S.W.(2) 577 16

Matthews v. Rodgers, 284 U. S. 521 .....11, 36, 39

Michigan Central R. R. Co. v. Powers, 201 U. S. 245 .....9, 23, 37

Michigan Railroad Tax Cases, 138 F. 223, affmd. 201 U. S. 245 23

Miller v. Nut Margarine Co., 284 U. S. 498 35

Pacific American Fisheries v. Alaska, 269 U. S. 269 .....8, 14, 21

Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531 34

Rapid Transit Corp. v. N. Y., 303 U. S. 573 ..20, 22, 25

Roberts v. Irrigation District, 289 U. S. 71 22

Roberts & S. Co. v. Emmerson, 271 U. S. 50 20

Royster Guano Co. v. Virginia, 253 U. S. 412 .. 9, 27

Salomon v. State Tax Commission, 278 U. S. 484 21

Sarlls v. Indiana ex rel Trimble, 201 Ind. 88, 166 N.E. 270 16

Page

Shaffer v. Carter, 252 U. S. 37 ..... 12, 40

Southern Ry. Co. v. Watts, 260 U. S. 519 ..... 10, 31

South Utah Mines & Smelters v. Beaver County, 262 U. S. 325 ..... 33, 34

State Railroad Tax Cases, 92 U. S. 575 35

Stratton v. St. L. S. W. Ry. Co., 284 U. S. 530 36

Talbot v. Silver Bow, 139 U. S. 438 25

Tax Commissioners v. Jackson, 283 U. S. 527 15, 20

Territory v. Pinney, 15 N. M. 625, 114 Pac. 367 25

Thomas v. Gay, 169 U. S. 264 ..... 22, 23

Travelers' Insurance Co. v. Connecticut, 185 U. S. 364 20

Utah Power & Light Co. v. Pfost, 286 U. S. 165 ..... 10, 34

Watson v. State Comptroller, 254 U. S. 122 20

Welch v. Henry, 305 U. S. 134 .....13, 15, 20, 21, 29

Western Union Telegraph Co. v. Indiana, 165 U. S. 304 23

Williams v. Mayor, 289 U. S. 36 21

Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 526 23

Statutes

Act of June 6, 1900, c. 786, §4, 31 Stat. 322, as amended, 48 USCA §101 2

Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, as amended, 48 USCA §78, (Alaska Organic Act) 7, 10, 12, 24, 29, 31, 32

Page

Act of Feb. 21, 1949, Chapter 10 Session Laws of Alaska, 1949 ..... Passim

Act of Mar. 23, 1949, Chapter 88, Session Laws of Alaska, 1949 ..... Passim

Alaska Compiled Laws Annotated, 1949:
§37-3-1 17
§37-3-11 17
§37-3-32 17
§37-3-41 17
§48-7-1(a) 11, 35, 37

New Federal Judicial Code, §1291 2

Miscellaneous

American Law Reports (cited as A.L.R.)
Vol. 57, p. 357 38
Vol. 76, p. 1012 38
Vol. 112, p. 1183 38

Matthews, *The Function of Constitutional Provisions Requiring Uniformity in Taxation*
Vol. 38, Kentucky Law Journal
Nov. 1949, pp. 65-66 15
Jan. 1950, pp. 203-204 15
May 1950, pp. 516-526 15

Senate Report No. 1272, May 12, 1948, 1948 U. S. Code Congressional Service, pp. 1684-1685 ..... 32, 33

NOTE

The relevant portions of Chapters 10 and 88, Session Laws of Alaska, 1949, are set out in Appendix A. The uniformity clause of Section 9 of the Alaska Organic Act (48 USCA §78, pocket part) and Subsection (a) of §48-7-1, Alaska Compiled Laws Annotated, 1949, are set out in Appendix B.

No. 12675

In The United States COURT OF APPEALS

For the Ninth Circuit

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,

Appellant,

v.

LUTHER C. HESS and ALASKA JUNEAU GOLD MINING CO., a corporation,

Appellees.

Upon Appeal from the District Court for the Territory of Alaska, Fourth Division

BRIEF FOR APPELLANT

J. GERALD WILLIAMS
Attorney General of Alaska
JOHN H. DIMOND
Assistant Attorney General
Juneau, Alaska
For Appellant.

OPINION BELOW

The opinion of the district court is reported in 91 F. Supp. 139.

JURISDICTION

This is a suit to enjoin the appellant from enforcing the provisions of the Alaska Property Tax Act, Chapter 10, Session Laws of Alaska, 1949, as amended, and to have declared invalid the Act in its entirety. Judgment and decree was entered on August 1, 1950, declaring the Act invalid in its entirety, with the exception of the amendment thereto contained in Chapter 88, Session Laws of Alaska, 1949, and granting a permanent injunction (R. 89-92). An appeal was taken on August 7, 1950, by filing with the district court a notice of appeal (R. 88). The jurisdiction of the district court was invoked under the Act of June 6, 1900, c. 786, §4, 31 Stat. 322, as amended, 48 USCA §101. The jurisdiction of this court rests on §1291 of the New Federal Judicial Code.

QUESTIONS PRESENTED

1. Whether Chapter 10, Session Laws of Alaska, 1949, known as the Alaska Property Tax Act, is a valid exercise of the taxing authority of the Territory of Alaska.

2. Whether an injunction should have been issued enjoining the enforcement of the provisions of the Alaska Property Tax Act.

STATEMENT

This action was instituted by appellee, Luther C. Hess, on December 2, 1949, to enjoin the enforcement of the Alaska Property Tax Act, Chapter 10, Session

Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, and to have declared invalid the Act in its entirety (R. 2-17). In addition to appellant herein, defendants named in the action were the City of Fairbanks and the Fairbanks Independent School District, neither of whom are parties to this appeal. Appellee, Alaska Juneau Gold Mining Company, intervened in this action on January 13, 1950, (R. 30) and in its complaint in intervention prayed for the same relief as sought by appellee, Luther C. Hess (R. 18-29).

Appellee, Luther C. Hess, is a resident of the Territory of Alaska and the owner of certain real properties located within the City of Fairbanks, Alaska, and the Fairbanks Independent School District, and is also the owner of a certain group of patented and unpatented mining claims located in territory outside the boundaries of any municipality or school district (R. 74). Appellee, Alaska Juneau Gold Mining Company, a West Virginia corporation, owns property in the City of Juneau, Alaska, the Juneau Independent School District, the City of Douglas, Alaska, the Douglas Independent School District, and in territory not included within any municipality or school district (R. 75-78). All of the property of appellees is taxable under the provisions of the Alaska Property Tax Act.

The district court granted a preliminary injunction on January 30, 1950, enjoining appellant, until final determination of the cause, from collecting any of

the taxes imposed by the Act upon any property owned by appellees in the Territory of Alaska (R. 33-35). Thereafter trial was had on May 15, 1950, at which time appellees introduced evidence in support of their complaints (R. 158-163, 124-138, 96-122), and appellant introduced evidence in support of the affirmative allegations contained in his amended answers to the complaints (R. 163-164, 138-150). On June 19, 1950, the court issued its opinion holding that the whole of Chapter 10, Session Laws of Alaska, 1949, was invalid except as to the tax levied on boats and vessels under Chapter 88, Session Laws of Alaska, 1949 (R. 49-72).

Findings of fact and conclusions of law were filed in accordance with the court's opinion (R. 72-87), and on August 1, 1950, judgment and decree was entered declaring Chapter 10, Session Laws of Alaska, 1949, to be invalid, except as to boats and vessels under Chapter 88, Session Laws of Alaska, 1949, and a permanent injunction was issued enjoining the appellant from enforcing the provisions of Chapter 10, Session Laws of Alaska, 1949 (R. 89-92). This appeal followed (R. 88).

SPECIFICATIONS OF ERROR

The specifications of error and the points relied on by appellant may be summarized as follows:

1. The court erred in holding that the tax levied by Chapter 10, Session Laws of Alaska, 1949, is invalid as not being valued and uniform as required by

Section 9 of the Organic Act of the Territory of Alaska. (R. 85, 151).

2. The court erred in holding that the tax levied under Chapter 10, Session Laws of Alaska, 1949, is invalid as being a taking of property without due process of law, forbidden by the Fifth Amendment to the Constitution of the United States. (R. 85, 151-152).

3. The court erred in holding that the tax levied by Chapter 10, Session Laws of Alaska, 1949, upon unimproved, unpatented mining claims which are not producing and upon unimproved non-producing patented mining claims upon which the improvements originally required for patent have become useless through deterioration, removal or otherwise, is contrary to Section 9 of the Organic Act of Alaska, as amended by the Act of Congress of June 3, 1948, and is therefore invalid as not valuing such claims according to their true and full value, nor at the price paid the United States therefor, nor at a flat rate fixed by the legislature. (R. 84-85, 152-153).

4. The court erred in holding that the last sentence in Section 11 of Chapter 10, Session Laws of Alaska, 1949, which provides "the true value of property shall be that value at which the property would generally be taken in payment of a just debt from a solvent debtor" is invalid as being contrary to the provisions of Section 9 of the Organic Act of Alaska. (R. 85, 153)

5. The court erred in holding that appellees have no adequate remedy at law, and that the enforcement of Chapter 10, Session Laws of Alaska, 1949, would have resulted in irreparable injury to appellees, and that the bringing of this action prevented a multiplicity of actions. (R. 84, 153)

6. The court erred in holding that the liens impressed by the tax levied under Chapter 10, Session Laws of Alaska, 1949, upon the properties of appellees situated in the Territory of Alaska outside of municipalities, independent and incorporated school districts, and public utility districts, constitute a cloud on the titles of appellees to such properties which they are legally entitled to have removed in a court of equity. (R. 85-86, 154)

7. The court erred in making and entering its Conclusion of Law No. VII, which reads as follows: "That the temporary injunction heretofore issued in this cause restraining the defendant M. P. Mullaney, Commissioner of Taxation, and his agents, deputies, official representatives, and all persons acting under him, from enforcing the provisions of Chapter 10, Session Laws of Alaska, 1949, against the property (other than boats and vessels) of plaintiff and intervenor herein, should be made permanent and the bonds given pursuant to the requirements of the preliminary injunction exonerated and the sureties thereon discharged." (R. 86, 154)

8. The court erred in entering judgment and decree in favor of appellees and permanently enjoining appellant from collecting or attempting to collect from appellees the tax imposed by Chapter 10, Session Laws of Alaska, 1949, upon property owned by them in the Territory of Alaska outside of municipalities and independent and incorporated school districts. (R. 90, 154-155)

SUMMARY OF ARGUMENT

I.

The Alaska Property Tax Act does not contravene the uniformity clause of Section 9 of the Alaska Organic Act, which provides that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the true and full value thereof . . ." (Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, as amended, 48 USCA §78.)

A. The ultimate objective to be achieved in taxation is equality in the distribution of the burden of government. If this is true, the constitutional requirements of uniformity should not be applied as a narrow restrictive limitation on the power of the legislature to classify for purposes of taxation, but should rather be used as a general objective and guide for the legislature in the exercise of its taxing authority. This would allow reasonable classifications which indeed are necessary in order to achieve real equality in taxation, and sufficient protection against undue

discrimination would be found in the equal protection clause of the Fourteenth Amendment to the United States Constitution. Uniformity and equal protection are, therefore, substantially identical in their requirements, and the arguments here with respect to the alleged inequalities, discriminations and lack of uniformity in the Alaska Property Tax Act should thus be approached with the thought that the validity of the Act must be judged by the same standards of equality and uniformity demanded by equal protection as would be applied in the case of legislation involving excise and income taxes. See *Alaska Steamship Co. v. Mullaney*, 180 F.(2) 805, 817-818.

B. The classification in the Alaska Property Tax Act between (1) incorporated cities and towns and incorporated and independent school districts, and (2) territory outside of such areas, hereinafter referred to as Class I and Class II, respectively, is merely a recognition of, and an attempt to correct, previous inequities between these two classes that existed by reason of the fact that persons in Class II had for many years paid no property taxes and had received greater benefits from the territorial government than those in Class I, and is, therefore, not without reasonable basis and is founded upon "intelligible grounds of policy." *Pacific American Fisheries v. Alaska*, 269 U. S. 269, 278. This general classification, therefore, being sustainable, and standards of equality and uniformity not having been violated, the differences in the methods of assessment, collection and enforce-

ment of taxes between the two classes do not constitute any lack of uniformity since all constituents of each class are treated alike. *Michigan Central R. R. Co. v. Powers*, 201 U. S. 245, 301.

C. The fact that the property tax ordinances of the various cities and school districts in Class I are not identical does not offend constitutional uniformity. The 1% property tax collected within each of those taxing districts is to be used only for that individual district's school purposes and not for the purposes of some other district, and there is thus a direct relation between government burden and benefit in each taxing district unrelated to that extent to each of the others. All those in similar circumstances are treated alike, and this is all that is required by equality and uniformity. *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415.

D. As a practical matter, appellees have not been discriminated against. The tax levied on their property in Class I territory would have been paid, and in approximately the same amount, even in the absence of the Alaska Property Tax Act. As far as is concerned the tax levied on their property in Class II territory, there could be no complaint of discrimination since the owners of property in Class II have not only never before been subject to property taxes, but by reason of owning property therein have received from the territorial government greater benefits than those in Class I.

E. The fact that in Section 11 of the Alaska Property Tax Act the legislature has specified what factors are to be considered in determining the value of property for purposes of the tax does not circumvent the requirement of uniformity that property be assessed according to true and full value. As long as the same method of valuation is applied to all within a division resulting from a classification that is valid, the method chosen is fully within legislative discretion. Moreover, there is in this case neither a disclosure of a plan of discrimination or a showing that in practical operation appellees' property has been intentionally and systematically discriminated against. See *Southern Ry. Co. v. Watts*, 260 U. S. 519, 526; *Charleston Assn. v. Alderson*, 324 U. S. 182, 190-191.

II.

In providing that certain kinds of mining claims are to be valued at "$500.00 per each 20 acres or fraction of each such claim" (Alaska Property Tax Act, §3), the territorial legislature has merely complied with congressional directive as evidenced by the 1948 amendment to §9 of the Organic Act (48 USCA §78, pocket part). If an interpretation of the words "or fraction of each such claim" as meaning that such claims have a value of $25.00 per acre is considered too strained to be justified, then unformity can still be achieved by striking those words under the authority of §45 of the Act, the severability clause. *Electric Bond Co. v. Commission*, 303 U. S. 419, 434; *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 185.

III.

There has been no showing in this case of those special and extraordinary circumstances that will warrant equitable relief by way of injunction. With respect to the taxes on property in Class II that appellees should pay, they have a completely adequate remedy at law to pay the taxes under protest and then bring an action against the Tax Commissioner to recover them back, at which time the validity of the Act could be determined. §48-7-1(a) Alaska Compiled Laws Annotated, 1949. This remedy at law defeats the jurisdiction of equity. *Matthews v. Rodgers*, 284 U. S. 521, 526. With respect to taxes on appellees' property in Class I, although here the refund statute may not be applicable, appellees cannot complain of a lack of an adequate legal remedy because even in the absence of the 1% territorial property tax, the same taxes would have been paid to the cities and school districts under their local tax ordinances. There is also no justification for equitable relief on the ground that such is necessary in order to avoid a multiplicity of actions, for in one suit at law under the provisions of the territorial refund statute (§48-7-1(a), *supra*) there would be afforded complete opportunity for the assertion of appellees' claim as to the invalidity of the Act, and there is nothing to show that more than one suit would be necessary. Cf. *Matthews v. Rodgers*, *supra*, p. 529. Finally, equity jurisdiction cannot be invoked on the theory that an injunction is necessary to remove a cloud from the titles of appellees' property, since there

exists an adequate remedy at law, *Shaffer v. Carter*, 252 U. S. 37, 46, and since appellees, in practical effect, are alleging nothing more than that the tax is unconstitutional—an allegation by itself insufficient to constitute a basis for equitable relief. *Dodge v. Osborn*, 240 U. S. 118, 121-122.

ARGUMENT

I.

THE ALASKA PROPERTY TAX ACT, CHAPTER 10, SESSION LAWS OF ALASKA, 1949, IS A VALID ACT AND DOES NOT CONTRAVENE THE UNIFORMITY CLAUSE OF SECTION 9 OF THE ALASKA ORGANIC ACT.

A. The standards of uniformity and equality demanded by Section 9 of the Alaska Organic Act and by the equal protection clause of the Fourteenth Amendment are essentially the same.

The provisions of the Organic Act of Alaska that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the true and full value thereof . . ." (Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, as amended, 48 USCA §78)has been given consideration by this court in a previous case involving the validity of the Alaska Net Income Tax Act, *Alaska Steamship Co. v. Mullaney*, 180 F.(2) 805, 817-818, and was in that case held to require no greater measure of equality and uniformity than the equal protection requirement of the Fourteenth Amendment to the United States Con-

stitution. A similar view has been expressed by the United States Supreme Court with relation to a chain store license tax under the uniformity provision of the constitution of West Virginia, *Fox v. Standard Oil Co.*, 294 U. S. 87, 102, and with respect to a tax on royalties from mines under the uniformity clause of the Minnesota constitution. *Lake Superior Consolidated Iron Mines v. Lord*, 271 U. S. 577, 581. It is true that in none of these cases was an *ad valorem* property tax involved, yet in considering the Alaska Property Tax Act as it relates to uniformity, there is no reason why a different rule should be applied. With respect to *ad valorem* property taxes, as well as income and excise taxes, uniformity under the Organic Act of Alaska and equality under the Fourteenth Amendment should be substantially the same.

The real question arising from the problem of regarding uniformity either as more restrictive than equal protection or as substantially the same, is whether the rule of uniformity is to be applied as a narrow restrictive limitation on the right of a legislature to classify in taxation or as a general objective of the legislature—a guide in the exercise of its taxing power. If, as the United States Supreme Court has stated, taxation is the means by which government distributes the burden of its cost among those who enjoy its benefits, *Welch v. Henry*, 305 U. S. 134, 144, and if "the policy of taking cognizance of the obligation of all men who depend upon the maintenance of law and order in a state or territory where

they . . . own property, to bear their fair share of the cost of supporting the government which protects them" has increasingly been given free rein by the Supreme Court, *Alaska Steamship Co. v. Mullaney*, 180 F.(2) 805, 813, then it would appear to follow that the ultimate objective to be achieved in the exercise of taxing power would be fairness of taxation—equality in bearing expenses of government. This being the broad goal of a legislature in taxation, uniformity would logically contemplate rather than forbid the "greatest freedom in classification", *Madden v. Kentucky*, 309 U. S. 83, 88, since true practical equality can only be attained by taxing some property differently from other property. *Adams Express Co. v. Ohio State Auditors*, 165 U. S. 194, 228. It would not then be reasonable to adopt a narrow restrictive interpretation of uniformity as, for instance, permitting classification of property as to its kind but not as to its location (R. 58-59), for to do so would, in effect, be denying the legislature its right to decide how the tax burden can be most equitably distributed —a blow really at the government's vital power to raise revenue for its continued existence. It would be only consistent with the legislature's "full and unlimited power of taxation," *Alaska Fish Co. v. Smith*, 255 U. S. 44, 49; *Pacific American Fisheries v. Alaska*, 269 U. S. 269, 277, that uniformity of taxation be not a narrow specific rule, but a broad objective which the legislature must seek in order to achieve real equality in the distribution of the burden of government. If, when seeking the attainment of such

a goal, the legislature adopts classifications which—whether based on kinds, owners or locations of property—are reasonably related to the legislative objective sought, and not based merely on caprice or fiction, then fairness in taxation will be achieved and standards of equality and uniformity will be recognized and adhered to. *Welch v. Henry, supra,* pp. 144-145; *Tax Commissioners v. Jackson,* 283 U. S. 527, 537-538. Sufficient protection against any undue discrimination will be found in the requirements of equal protection, and there is then no reason for considering Territorial uniformity and Constitutional equality as being other than substantially identical in their requirements. See *Matthews, The Function of Constitutional Provisions Requiring Uniformity in Taxation,* 38 Ky. Law Journal, pp. 65-66 (Nov. 1949); ibid. pp. 203-204 (Jan. 1950); ibid. pp. 516-526 (May 1950).

If then, uniformity under the Organic Act requires only that a classification be reasonable, and rationally related to a legitimate end of governmental action, *Welch v. Henry, supra,* p. 144, the further requirement in the uniformity clause that "taxes . . . shall be levied and collected under general laws" adds nothing to the requirements of equal protection, since a statute is "general" when it applies equally to all within a classification that is based on distinctions reasonably justifying differences in treatment. *Heisler v. Thomas Colliery Co.,* 274 Pa. 448, 118 Atl. 394, 399; *Lelande v. Lowery,* 26 Cal.(2) 224, 157 P.(2)

639, 645; *Manning v. Sims*, 308 Ky. 587, 213 S. W. (2) 577, 586; *Sarlls v. Indiana ex rel. Trimble*, 201 Ind. 88, 166 N.E. 270, 276. It is evident, therefore, that the arguments made with respect to the alleged inequalities, discriminations and lack of uniformity in the Alaska Property Tax Act should be approached with the thought that the validity of the Act must be judged by the same standards of equality and uniformity demanded by equal protection that would be applied in the case of legislation involving excise or income taxes. The fact that there is being considered here an *ad valorem* property tax, rather than a case where uniformity was construed in its application to either an income or excise tax, *Alaska Steamship Co. v. Mullaney*, *Fox v. Standard Oil Co.*, *supra*, is no reason for the establishment of a different rule.

B. The legislature has adopted a broad classification in the Act which fully satisfies standards of equality and uniformity.

The Alaska Property Tax Act levies a 1% tax on all real and personal property within the Territory. The legislature, in Section 4 of the Act, has prescribed a broad, general classification by drawing a distinction between (1) property located within incorporated cities and towns, independent school districts, incorporated school districts, and public utility districts; and (2) property located in territory outside of such areas—these two classes being hereinafter referred to as Class I and Class II, respectively. Within Class I the 1% tax is to be assessed, collected and

enforced according to the property tax ordinances of the municipalities and districts, whereas in Class II the 1% tax is to be assessed, collected and enforced according to specific provisions contained in the Act. Moreover, every incorporated city and town, not part of an independent school district, which by territorial law constitutes a "city school" (§37-3-1, §37-3-32, Alaska Compiled Laws Annotated 1949) and "incorporated school districts" which are formed from a town, village or settlement outside of an incorporated town (§37-3-11 Alaska Compiled Laws Annotated 1949), are permitted by the Act to retain the 1% tax levied thereunder and assessed and collected by the tax collection authorities of such districts. In the third type of school district, the "independent school district", which consists of a combination of an incorporated city and its adjacent settlement (§37-3-41 Alaska Compiled Laws Annotated 1949), the situation is slightly different. There the 1% tax on property within the city is turned over to the city, and it in turn pays a portion of this money to the school board of the independent school district. The 1% tax collected on property within the independent school district but outside of the municipal limits is turned over to the school board of the school district, and it retains for school purposes that portion which represents a levy equal to that which would have to be made within the city to raise its share of school expenses, up to and including the maximum levy under the Act of 10 mills. However, if the city's share of school expenses represents a levy of less than 10 mills, then the school

district's share would have to be based upon the same levy, and out of the total 10 mills collected by the school board on property within the district but outside of city limits, the board must remit to the Territory the difference between the 10-mill levy and that levy which was necessary to raise the school district's share of school expenses. With respect to public utility districts, the taxes collected therein are to be handled in a like manner to those collected in cities.

There thus exists a situation where the 1% Alaska Property Tax, levied on all property within Class I, is retained by the municipalities and school districts after being assessed and collected according to the provisions of their respective property tax ordinances, each of which differs in some particulars from the others; and that levied upon property in Class II is retained by the Territory after being assessed and collected according to the provisions contained in the Alaska Property Tax Act, which differ considerably from the provisions of all of the city and school district ordinances. This, it is claimed, is so offensive to constitutional standards of equality and uniformity that the Act must fail in its entirety.

When the legislature divided property within the Territory into two separate classes, it was doing nothing more than exercising the freedom of classification that it possessed. *Madden v. Kentucky*, 309 U. S. 83, 88. From the evidence adduced on behalf of appellant, it is seen that for many years there has been contained in the territorial laws providing for the

establishment and maintenance of public schools in Alaska a classification similar in form to that contained in the Property Tax Act. There the incorporated towns and cities, incorporated school districts and independent school districts (all being referred to generally as "incorporated school districts") (R. 140) received different treatment from the Territory than did the rural schools located in territory outside of such municipalities and districts. Territorial funds, having for their source contributions by way of other taxes and various license fees applicable on an equal basis to persons residing in both areas, were used to give complete support to the rural schools and only approximately two-thirds support to the incorporated schools (R. 141-150). The remaining one-third for the latter had to be raised by local taxes imposed upon persons and property residing and located within the incorporated school districts, taxes which persons and property in rural communities did not have to pay. Although this classification in form resembles that adopted in the Act, the result was entirely different. Under the school system, those residing and owning property within Class I were discriminated against instead of being favored, and those residing in Class II received, by reason of such residence, greater benefits from the territorial government than did taxpayers in Class I. This in itself would afford a basis for the classification adopted in the Act since it could well have been the intention of the legislature to remove such existing inequities, and in effect, that is what has been done. Every incorporated school dis-

trict can now utilize for the support of its schools the funds raised from the 1% territorial tax on property within its limits, while in Class II territory the tax cannot be retained but must be turned over to the territorial treasury. This procedure, then, instead of being a discrimination against persons in Class II territory, accomplishes the removal of a discrimination against those in Class I which existed before the Property Tax Act became law, and moreover, reasonably has the beneficial effect of encouraging community responsibility in those towns and villages where no local contribution was required toward the support of schools, an effect related to the common good. Such legislative action is thus reasonably related to a permissible policy of taxation and to a legitimate end of government action. Cf. *Roberts & S. Co. v. Emmerson*, 271 U. S. 50, 57; *Rapid Transit Corp. v. N. Y.*, 303 U. S. 573, 580, 587; *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 512; *Aero Transit Co. v. Georgia Comm'n.*, 295 U. S. 285, 291; *Watson v. State Comptroller*, 254 U. S. 122, 124-125; *Welch v. Henry*, 305 U. S. 134, 144; *Dissenting opinion of Mr. Justice Stone* in *Colgate v. Harvey*, 296 U. S. 404, 439. At the very least, a state of facts can reasonably be conceived to justify the difference of treatment between the two classes, *Tax Comm'rs. v. Jackson*, 283 U. S. 527, 537, and this excludes the possibility that there is anything contained in the classification which indicates a hostile or oppressive discrimination against any particular class of persons or property. *Travelers' Insurance Co. v. Connecticut*,

185 U. S. 364. In taxation where classifications may by validly grounded on the theory of equality of a distribution of governmental burden, a distinction such as is contained in the Act which recognizes previous inequities and lack of uniformity and attempts to correct such situation, is not without reasonable basis and certainly is founded upon "intelligible grounds of policy." *Pacific American Fisheries v. Alaska*, 269 U. S. 269, 278. Equal protection, therefore, being not denied, there is no ground for the contention that the classification results in a lack of uniformity or a violation of the requirement that taxes shall be levied and collected under general laws.

It is, of course, conceivable that this method of accomplishing the legislative objectives will not appear to some to be the wisest and most equitable, but it is enough that the relation between means and end is not wholly vain or illusory. *Williams v. Mayor*, 289 U. S. 36, 42. Even if it were possible to discover certain inequalities as to things embraced within one of the two classes, the groups selected as a whole represent classes within themselves. The equal protection clause does not require the legislature to maintain rigid rules of equal taxation, resort to close distinctions, or maintain a precise scientific uniformity. *Welch v. Henry*, *supra*, p. 145; *Lawrence v. State Tax Commission*, 286 U. S. 276, 284-285; *Salomon v. State Tax Commission*, 278 U. S. 484, 491-492. Neither is it a valid objection to the validity of the classification that the revenues derived from the tax on Class II

property might exceed the total monies appropriated by the Territory in any one year for the support of all of the rural schools, or that a taxpayer owning property in Class II territory at a place remote from places where schools are located may claim to receive no benefit related to the object of the classification. Even if it could be shown for what purposes the taxes on Class II property were appropriated by the legislature, it never has been constitutionally necessary that there be a relation between the classification and the appropriation, and that taxes be levied only to the extent that they are used to compensate for the burden on those who pay them. *Carmichael v. Southern* Coal *Co.*, 301 U. S. 495, 521-523; *Rapid Transit Corp. v. N. Y.*, 303 U. S. 573, 585-587; *Thomas v. Gay*, 169 U. S. 264, 279-280. The fact that the tax may exceed the benefits does not make it defective in the absence of a showing that it is palpably arbitrary. *Roberts v. Irrigation Districts*, 289 U. S. 71, 75. Cf. *General American Tank Car Corp. v. Day*, 270 U. S. 367, 373-375.

The classification being sustainable, it is therefore no objection as far as requirements of equality and uniformity are concerned that under the various tax ordinances of the cities and school districts in Class I and under the provisions of the Act as they apply to Class II there are different methods, times and procedures for assessment, different provisions for the imposition of liens and the foreclosure of the same, different periods for redemption of property sold at a

tax sale, different times for payment of taxes and different provisions for interest and penalties on delinquent taxes, and different procedures for equalization of assessments; that discounts may be granted in one taxing unit but not in the other, that intangible personal property is subject to taxation in Class I but not in Class II, that personal liability for nonpayment of taxes on personal property attaches to a taxpayer in Class I but not in Class II, and that there is no equalization of assessments between the two classes. If the classification is proper, then differences such as these are clearly matters of detail within the discretion of the legislature and cannot be denied without imposing undue restraints upon the power of the legislature to adopt classifications. *Thomas v. Gay*, 169 U. S. 264, 282-283; *Michigan Central R. R. v. Powers*, 201 U. S. 245, 300-302; *Foster v. Pryor*, 189 U. S. 325, 332-334; *Western Union Telegraph Co. v. Indiana*, 165 U. S. 304, 309; *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526, 538; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337-339. As far as Class II is concerned, the same means and methods are applied impartially to all constituents of the class, so that the law operates equally and uniformly upon all persons and property similarly situated. *Michigan Central R. R. v. Powers, supra*, p. 301.

Nor need there be any provisions for equalization of assessments between the two classes of property. *Michigan Railroad Tax Cases*, 138 F. 223, 241, affmd. 201 U. S. 245, 301-302. This is true even though it

may be argued that that part of the Organic Act which requires that "the assessments shall be according to the true and full value . . ." (48 USCA §78, as amended) necessarily requires equalization between the two classes and that this cannot be done because the ordinances of some of the municipalities and school districts make provision for assessment according to "actual value" (R. 98, 103, 108, 120), "true and fair value" (R. 117), and "just and fair value" (R. 103, 108). The answer to this contention is that this requirement of the Organic Act requires no greater measure of uniformity and equality than does the provision requiring taxes to be uniform; therefore, if the classification itself be proper, there is no necessity for having one unvarying rule or basis for determining assessable values applicable to all of the classes. As long as under the standard or basis of valuation applied, all similarly situated are treated alike, standards of uniformity are satisfied. See *Greene v. Louisville & I. R. Co.*, 244 U. S. 499, 516.

In addition to its conclusion that the uniformity clause of Section 9 of the Alaska Organic Act had been violated, the district court held that the tax levied under the Act was invalid as being a taking of property without due process of law contrary to the Fifth Amendment to the Constitution of the United States (R. 85). To such an assertion it is sufficient answer that if there is nothing in the legislative scheme of classification in the Act constituting a denial of equal protection, there has been no taking of property with-

out due process of law. *Fox v. Standard Oil Co.*, 294 U. S. 87, 103; *Rapid Transit Corp. v. N. Y.*, 303 U. S. 573, 587.

C. The fact that the property tax ordinances of the various municipalities and school districts in the Territory are not identical does not invalidate the Act.

The objective of a more equitable distribution of governmental burden having been accomplished by the legitimate means of adopting the classification mentioned above, the fact that in Class I the 1% territorial tax is collected and retained by the respective municipalities and school districts in which it is levied, pursuant to the provisions of their individual property tax ordinances, does not contravene standards of equality and uniformity. Although some State constitutions prohibit the legislature from imposing any tax on property within a local subdivision of the state and allow the legislature authority only to vest the taxing power in such local subdivision, there is no such prohibition contained in the Constitution of the United States, the Alaska Organic Act, or any congressional enactments applicable to Alaska—these being the only places where restrictions on the taxing power of the Territory are to be found. *Talbott v. Silver Bow*, 139 U. S. 438, 448; *Territory v. Pinney*, 15 N. M. 625, 114 Pac. 367, 368.

If, therefore, the means adopted to accomplish a permissible end are otherwise valid, it is not a sufficient objection to the validity of the Act that as be-

tween the different municipalities and school districts comprising Class I there may be different times and modes of assessment, different times for payment of taxes, different provisions for penalties and interest on delinquent taxes, and different provisions for equalization of assessments; that discounts may be granted in one taxing unit and not in another, and that there is no equalization of assessments among such local taxing units. If the power to classify in taxation is established, it follows that the legislature may adopt subclassifications by making distinctions having a rational basis within one of the original classes. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 509; *Featherstone v. Norman*, 170 Ga. 370, 153 S. E. 58, 66. That a rational basis exists here is evident, for if it is accepted that the theory of classification can be supported as a means of distributing the cost of government among those who enjoy its benefits, *Carmichael v. Southern Coal Co., supra*, p. 508, it must also be accepted that the absence of one specific, unvarying rule for the assessment, collection and enforcement of taxes in each of the units comprising Class I, and the absence of equalization among them, is really only consistent with the demands of equality and uniformity. *Louisiana v. Pilsbury*, 105 U. S. 278, 295-296. Although the tax so collected benefits in a general way the Territory as a whole, since schools are governmental and public in nature, it particularly benefits each district in which it is assessed and collected, since it is to be used for that individual district's school purposes and not for the

purposes of some other district. There is then a direct relation between governmental burden and benefit in each taxing district that is unrelated, to that extent, to each of the other taxing districts. All similarly situated are treated alike, and that is all that is required by equal protection. *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415; *Magoun v. Ill. Trust & Savings Bank*, 170 U. S. 283, 293, 299-300.

D. Appellees have not been the victims of any unconstitutional discrimination.

The chief argument against the validity of the Act is that it is totally lacking in uniformity. When such a contention is made, what is really being said is that the Act contains invalid classifications; and a classification in a taxing statute is invalid for one reason, that is, because one of the classes is treated unfairly or discriminated against as compared to the treatment given to other classes. Looking then at the basis of the contention that the Act violates uniformity requirements, it is difficult to find wherein appellees have been discriminated against or treated unfairly. As far as is concerned appellees' property within Class I, the taxes that have been paid to the various municipalities and school districts would have been paid even in the absence of the Alaska Property Tax Act, and pursuant to the provisions of the various tax ordinances as they existed before. Therefore, it cannot now seriously be contended that appellees are injured by lack of uniformity on the ground that the tax ordinances of the various cities and school dis-

tricts comprising Class I are not identical in their provisions for assessment, penalties, interest and discounts, and that there is no equalization of assessments between the various cities and districts. No such contention was ever made before the passage of the Act for the reason that there would have been no basis in law for such an argument. Uniformity and equality in taxation have never demanded that one unvarying rule for the assessment, collection and enforcement of taxes be applied to local taxes for local purposes. *Louisiana v. Pilsbury*, 105 U. S. 278, 295. Therefore, if there were no lack of uniformity in this respect before the passage of the Act, there can be none now.

With respect to the 1% tax on appellees' property in Class II, which is paid directly into the territorial treasury presumably to be used for general territorial purposes, the only possible discrimination against the taxpayer in Class II that could be alleged would be that those residing and owning property within the municipalities and school districts of Class I would receive benefits from a fund to which they as a class did not contribute, since their tax is retained by the municipality or school district to which it is paid. However, not only have persons in Class II never before been obliged to pay property taxes, as those in Class I have for many years, but by reason of owning property in territory outside of municipalities and school districts, they received from the Territory greater benefits than did the residents of the cities

and school districts. The distribution of the tax burden by now placing it in part on a special class, which by reason of previous legislative policy had received greater benefits than those of another class and had escaped burdens to which those of the other class had been subject, is certainly not a denial of equal protection. *Welch v. Henry*, 305 U. S. 134, 144. Not only is the practical operation of such a procedure not injurious to appellees, but there is nothing contained therein which discloses any purpose or plan to discriminate against them. Cf. *General American Tank Car Corp. v. Day*, 270 U. S. 367, 373-375. There being, therefore, no injury to or discrimination against appellees by reason of their owning property either in Class I or Class II territory, it follows that the classification adopted by the legislature is valid and does not violate the uniformity clause of the Alaska Organic Act.

E. The procedure for determining assessable values as set forth in Section 11 of the Act does not violate uniformity requirements and is therefore valid.

In the Organic Act of Alaska it is provided not only that taxes shall be uniform upon the same class of subjects, but that "the assessments shall be according to the true and full value thereof . . ." (Organic Act, §9, 48 USCA §78, *supra.*) This latter requirement should require no greater measure of uniformity and equality than the provision that taxes shall be uniform upon the same class of subjects, since the reason for adopting "true and full value" as the

standard for valuations is as a convenient means to an end—the end being equal taxation. *Greene v. Louisville & I. R. Co.*, 244 U. S. 499, 516. This being true, it follows that if a classification in a taxing statute is otherwise valid and reasonable, it will not fail for lack of uniformity because an identical standard for valuations is not used for all classes. All that is required is that the same standard be applied to all similarly situated. *Greene v. Louisville & I. R. Co.*, *supra*, p. 516.

It makes no difference, therefore, what the legislature specifies is to be considered in determining the value of property for purposes of taxation, for as long as the same method is applied to all within a class, the one chosen is entirely within legislative discretion. The territorial legislature, in Section 11 of the Act, has exercised this discretion, and there is nothing therein which is unconstitutional or invalid. First of all, no departure has been made from the requirements of the Organic Act, since it has been specifically provided in the first sentence of this section that "property shall be assessed at its full and true value in money . . ." (Ch. 10, Session Laws of Alaska, 1949, §11); and the fact that in the last sentence of Section 11 the term "true value" is defined without including in such definition "full value" is not reasonably any indication of the legislature's intent to contradict its declaration in the first part of that section and have property valued not at "full value" but only at "true value." Secondly, there is no lack of uni-

formity in this method of valuation, since there not only is no disclosure of a plan or purpose to discriminate, but in practical operation the provisions of Section 11 have no such effect. It is true that a taxpayer would be discriminated against if his property were assessed at one value while other property of the same class was undervaluated. But this would be true only if it were shown that such undervaluation was intentional and systematic, a showing which is totally absent from the record in this case. *Southern Ry. Co. v. Watts*, 260 U. S. 519, 526; *Charleston Assn. v. Alderson*, 324 U. S. 182, 190-191.

II. THE PROVISIONS FOR THE TAXATION OF MINING CLAIMS PURSUANT TO SECTION 3 OF CHAPTER 10, SESSION LAWS OF ALASKA, 1949, ARE NOT INVALID.

In 1948 Congress amended Section 9 of the Alaska Organic Act by providing that with respect to unpatented mining claims and nonproducing patented mining claims, the assessments thereof need not be according to true and full value but that such claims could be valued either at the price paid the United States therefor or at a flat rate fixed by the legislature. (Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, as amended June 3, 1948, c. 396, 62 Stat. 302, 48 USCA §78, pocket part.) The purpose of making such an exception to the general rule that all property should be assessed according to true and full value thereof was, as stated in the Report of the

United States Senate on the bill which contained this provision, because

> ". . . so far as can be ascertained, no formula has yet been devised by means of which the value of an unpatented and nonproducing patented mining claim can be fixed, without utilizing explorative techniques by competently trained engineers . . ." (Senate Report No. 1272, May 12, 1948, 1948 U. S. Code Congressional Service, at pp. 1684-1685.)

In enacting Chapter 10, Session Laws of Alaska, 1949, the Alaska legislature recognized this explicit declaration of Congressional intent and provided that "the assessed value of unimproved, unpatented mining claims which are not producing, and non-producing patented mining claims upon which the improvements originally required for patent have become useless through deterioration, removal or otherwise, is hereby fixed at $500.00 per each 20 acres or fraction of each such claim . . ." This provision, it is asserted by appellees and held by the trial court, is invalid because "the tax on mining claims is not at a flat rate and the assessment is not according to the true and full value thereof required by the Organic Act." (R. 84-85)

Since the ores which constitute the wealth of mining claims are hidden underground and the value of such property cannot thus be determined in the ordinary way, a situation which was recognized by Congress when it considered the amendment to Section 9, (Sen-

ate Report No. 1272, *supra*), it was perfectly reasonable to provide for taxation of unproducing mining claims at a flat rate, *South Utah Mines & Smelters v. Beaver County*, 262 U. S. 325, 330, and thus constitute such property a separate class for purposes of taxation. Moreover, if Congress with its plenary power to legislate for the Territory, *Binns v. United States*, 194 U. S. 486, 491-492, has the right to provide that territorial taxes shall be assessed according to true and full value, it necessarily has the power and authority to either do away with such requirement entirely or else modify it to the extent that it has done in the above mentioned amendment.

The "flat rate" at which particular classes of mining claims are to be valued, which the territorial legislature in its legitimate exercise of discretion has chosen, is "$500.00 per each 20 acres or fraction of each such claim." The words "or fraction of each such claim" are ambiguous, for it is difficult to determine whether it is meant (1) that such claims have an assessed value of $25.00 per acre, so that a claim of 2½ acres, for example, would be valued at $62.50, or (2) that every such claim, regardless of its size, is to be valued at $500.00. The latter construction of this provision was adopted by the lower court (R. 52), but the former being more consistent with principles of equality and uniformity should govern, since it is a fundamental rule that courts will adopt that construction of a statute which will uphold its validity. *Corporation Commission v. Lowe*, 281

U. S. 431, 438; *South Utah Mines & Smelters v. Beaver County, supra*, p. 331; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546. At the very least, even if the first construction should be considered too strained to be justified, uniformity could be achieved by striking the words "or fraction of each such claim" under the authority of the severability clause, Section 45 of the Act. See *Electric Bond Co. v. Commission*, 303 U. S. 419, 434. Such action would be justified, since it cannot be assumed that the legislature would have been satisfied to have sacrificed the entire Act in the event the words "or fraction of each such claim" should be interpreted in such a manner as to reach an unfair result. *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 185.

III. THE ISSUANCE OF THE INJUNCTION RESTRAINING THE ENFORCEMENT OF CHAPTER 10, SESSION LAWS OF ALASKA, 1949, WAS NOT JUSTIFIED SINCE APPELLEES HAVE NOT SHOWN THOSE SPECIAL AND EXTRAORDINARY CIRCUMSTANCES NECESSARY TO BRING THIS CASE UNDER ANY OF THE RECOGNIZED HEADS OF EQUITY JURISDICTION.

Recognizing from long exerience that the payment of taxes upon which government depends for its continued existence is often enforced against a reluctant and adverse sentiment, and being sensible of the evils to be feared if citizens can escape their lawful burden by the use of injunctions to interfere with the collection of taxes, the courts have established well settled

rules as to when the interposition of a court of equity is warranted. It is not sufficient for a taxpayer merely to allege that the taxing statute is unconstitutional and invalid, but he must show special and extraordinary circumstances that bring his case under one of the recognized heads of equity jurisdiction. *State Railroad Tax Cases*, 92 U. S. 575, 613-615; *Miller v. Nut Margarine Co.*, 284 U. S. 498, 509. Appellees have recognized these limitations by allegations of irreparable injury on the grounds that (1) there is no adequate remedy at law, (2) there is a danger of multiplicity of actions, and (3) clouds upon their titles to their real property would be created (R. 14-16). These special circumstances, however, upon which appellees base their right to obtain injunctive relief are more apparent than real, and therefore do not justify the issuance of an injunction in this case.

(1) As far as are concerned the taxes which appellees would be obliged to pay under the Act on their property in Class II areas, a territorial statute provides a legal remedy for payment of taxes under protest and recovery of such taxes if the taxpayer "recovered judgment against the Tax Commissioner for the return of such tax, or where, in the absence of such judgment it shall become obvious to the Tax Commissioner, that such taxpayer would obtain judgment against the Tax Commissioner for recovery of such tax if legal proceedings therefor were prosecuted by him . . ." (§48-7-1(a) Alaska Compiled Laws An-

notated 1949). A procedure such as is available here will defeat the jurisdiction of equity to enjoin the collection of the tax, *Matthews v. Rodgers*, 284 U. S. 521, 526, in the absence of any further showing that such remedy is not adequate. *Stratton v. St. L. S. W. Ry. Co.*, 284 U. S. 530, 534.

Such a remedy is not inadequate because it may be alleged that the Territory is insolvent and that even if a voucher were issued by the Tax Commissioner under the provisions of the refund statute mentioned above, it may not be paid promptly because of a lack of funds in the territorial treasury. On the record of this case there is a complete absence of any evidence indicating what the present status of the territorial treasury is, and appellees' guess as to the future ability of the Territory to pay its debts cannot reasonably cause the legal remedy to fail for lack of completeness and certainty. Cf. *Equitable Life Assurance Society v. Brown*, 213 U. S. 25, 50. It would indeed be a strange procedure to measure the adequacy of a remedy at law by certain nebulous conjectures as to what the condition of the government treasury would be at some indefinite future time. Cf. *Huston v. Iowa Soap Co.*, 85 F.(2) 649, 655, cert. denied 299 U. S. 594; *Casco County v. Thurston County*, 163 Wash. 666, 2 P.(2) 677, 679.

For a like reason the remedy does not fail because of a prediction that the Attorney General and the Treasurer of the Territory may possibly decide not to approve the refund voucher issued by the Tax Com-

missioner under the provisions of the territorial refund statute, §48-7-1(a) *supra*. It is not reasonable to assume that either of these territorial officials will refuse to approve such a voucher when either a judgment has been recovered against the Tax Commissioner for recovery of an illegal tax or when it is obvious that such a judgment would be recovered had legal proceedings been brought. There is no presumption that government officials will act arbitrarily and without reason and will not properly discharge their duties. *Michigan Central R. R. Co. v. Powers*, 201 U. S. 245, 295-296.

It is true that the refund statute does not make any provision for payment of interest and that the United States Supreme Court has held that a failure to pay interest on taxes illegally exacted causes the statutory remedy for recovery of taxes paid under protest to be inadequate. *Educational Films Corp. v. Ward*, 282 U. S. 379, 386. In that case, however, the refund was expressly without interest, whereas so far as appellant has been able to ascertain, no court in Alaska has ever decided in a case where the issue was properly presented, whether or not interest on tax refunds would be allowed under the territorial statute. It is entirely conceivable, therefore, that if a taxpayer were to recover judgment against the Tax Commissioner, interest would be allowed, particularly in view of the apparent weight of authority that interest is recoverable on tax refunds upon general principles even in the absence of statutory authority

therefor. (See annotations in 57 A.L.R. 357, 76 A.L.R. 1012, 112 A.L.R. 1183.) However, since that problem was not presented to the trial court in this case by a person seeking to obtain interest on a tax refund, and therefore not presented upon a state of facts necessitating a decision thereon, it should not have been decided at all. See *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288, 346. Consequently, the absence in the territorial refund statute of provisions for interest should not necessitate the construction that interest would not be recoverable in a hypothetical case where it might be asked for, and is no ground for the conclusion that this remedy at law is not adequate.

With respect to the taxes that appellees have paid to the cities and school districts in Class I, the territorial refund statute evidently has no application. However, this circumstance does not justify the issuance of the injunction because first, appellees have paid such taxes evidently without protest (R. 8, 21) and there could be no point in enjoining the collection of taxes already paid; and secondly, appellees would have paid substantially the same taxes even in the absence of the Alaska Property Tax Act since the resolutions of the cities and school districts, with the exception of the Juneau Independent School District. (R. 101-102) show that no part of the territorial 1% tax was assessed and collected over and above that which was levied, assessed and collected for school and municipal purposes pursuant to the provisions of

the respective property tax ordinances (R. 78-79, 97, 107, 111, 114-115, 118).

(2) There was no justification for the interposition of equity in this case on the ground that an injunction is necessary in order to avoid a multiplicity of actions (R. 84). Since, as is noted above, appellees have paid their taxes to the cities and school districts without protest, and since, with the exception of the Juneau Independent School District, the same taxes would have been paid even in the absence of the Alaska Property Tax Act, there would be no occasion for bringing suits against any of those cities and school districts if the Act were to be found invalid. In a single suit at law brought by either of the appellees against the Tax Commissioner to recover taxes on their property in Class II territory, the validity of the Act could be determined; and there is nothing indicating that more than one suit would be necessary. Cf. *Matthews v. Rodgers*, 284 U. S. 521, 529. Also, the possibility that other taxpayers may wish to bring similar actions does not justify injunctive relief. The jurisdiction of equity to avoid a multiplicity of actions is restricted to cases where there would otherwise be some necessity for suits between the same parties involving like issues of fact or law and not to cases where the appellant might be sued by persons other than appellees. *Matthews v. Rodgers, supra*, pp. 529-530; *Douglas v. Jeannette*, 319 U. S. 157, 165.

(3) Equitable jurisdiction cannot be properly invoked on the ground that there have been or will be created clouds on the titles of appellees to their real property. This exception to the rule that equity will not enjoin the collection of taxes is applicable only when there is no adequate remedy at law, *Shaffer v. Carter*, 252 U. S. 37, 46, for when such remedy is available, the claim that a cloud upon title is created is really alleging no ground for equitable relief independent of the mere assertion that the tax is unconstitutional—an allegation which is insufficient by itself to constitute a basis for equitable jurisdiction. *Dodge v. Osborn*, 240 U. S. 118, 121-122. Cf. *City Council of Augusta, Ga., v. Timmerman*, 233 F. 216, 218.

CONCLUSION

The paramount objective to be achieved in taxation is equality—fairness in distribution of the burden of government among those who enjoy its benefits. This being true, the provision in the Alaska Organic Act requiring taxes to be uniform upon the same class of subjects should not be construed and applied as a narrow, restrictive limitation on the power of the legislature to distribute that burden by adopting various methods of classifying in tax laws. True, practical equality can only be attained by allowing the legislature the greatest freedom in classification; the rule as to uniformity would then appear to contemplate rather than forbid any classification which the legislature, in its discretion, decides to adopt—as long as the method chosen is reasonable, not capricious or arbitrary and bears a rational relation to a legitimate end of governmental action. Sufficient protection against any undue discrimination can be found in the concept of equal protection; there is, therefore, no compelling reason for holding that Organic uniformity and Constitutional equality are not identical in their exactions.

Under such an interpretation of uniformity, the Alaska Property Tax Act must stand as a valid exercise of legislative authority. The territorial legislature cannot be said to have acted without reason in imposing a moderate tax on those in one class who for many years have entirely escaped property taxation and who, in addition, have received from the territor-

ial government complete support for public schools; and by favoring those in another class who, in contrast, have for many years paid *ad valorem* taxes and have been obliged to contribute from such local taxes approximately one-third of the total cost of maintaining their public schools. The objective in this classification is clear—to achieve a distribution of governmental burden, more equitable than it existed before—and the relation between means and end is not merely illusory but is real and substantial.

It is, therefore, respectfully submitted: (1) that the decree of the district court should be reversed to the extent that it holds that Chapter 10, Session Laws of Alaska, 1949, except as to boats and vessels under Chapter 88, Session Laws of Alaska, 1949, is invalid; and (2) that the case should be remanded to the district court for entry of a decree declaring Chapter 10, Session Laws of Alaska, 1949, to be valid in its entirety, dissolving the permanent injunction, and dismissing appellees' complaints.

Respectfully,

J. GERALD WILLIAMS
Attorney General of Alaska

JOHN H. DIMOND
Assistant Attorney General
Juneau, Alaska

For Appellant.

December, 1950

APPENDIX A

Chapter 10, Session Laws of Alaska, 1949

Section 1. TITLE. This Act may be cited as the "Alaska Property Tax Act".

Section 2. DEFINITIONS. As used in this Act, the following words and terms shall have the meanings ascribed to them in this section unless the context clearly indicates a different meaning:

(a) The word "assessor" means an authorized representative of a Board of Assessment and Equalization designated to perform the duties of making assessments in a judicial division.

(b) The word "board" means a Board of Assessment and Equalization.

(c) The word "Collector" means the Tax Commissioner or his authorized representative, employee or agent designated by him.

(d) The word "division" means judicial division as understood and recognized in Alaska.

(e) The word "improvements" include all buildings, Structures, fences and additions erected upon or affixed to the land, whether or not the title of the land has been acquired by any particular person.

(f) The word "include," when used in a definition contained in this Act, shall not be deemed to exclude other things otherwise within the meaning of the term defined.

(g) The word "person" means and includes any individual, trustee, receiver, firm, partnership, joint venture, syndicate, association, corporation, trust, or any other group acting as a unit.

(h) The words "personalty" or "personal property" shall mean all machinery, equipment, household goods, and other tangible personal property which is located on or used in connection with particular land, or owned, possessed or used independently of any particular land.

(i) The word "property" means and includes real property, improvements, and personalty, as herein defined.

(j) The words "real property" or "land" mean any estate or interest therein, including permit or license rights, and improvements thereon, and shall include all timber on patented lands.

(k) The words "Tax Commissioner" means the Tax Commissioner of the Territory of Alaska.

(1) The words "tax lien" embrace liens for penalties, interest and costs as well as for unpaid taxes.

(m) The word "Territory" means the Territory of Alaska.

Section 3. LEVY OF TAX. For the calendar year of 1949, and each calendar year thereafter there is hereby levied, and there shall be assessed, collected and paid, a tax upon all real property and improvements and personal property in the Territory at the rate of

one per centum of the true and full value thereof. For the purposes of this section the assessed value of unimproved, unpatented mining claims which are not producing, and non-producing patented mining claims upon which the improvements originally required for patent have become useless through deterioration, removal or otherwise, is hereby fixed at $500.00 per each 20 acres or fraction of each such claim, except that if the surface ground of any such claim is used for other than mining purposes and has a separate and independent value for such other purposes, the valuation as pertains to such non-mining uses and of improvements incidental to such uses shall be according to the full and true value thereof.

Section 4. TAX UPON PROPERTY WITHIN INCORPORATED CITIES AND DISTRICTS. The tax levied under the provisions of Section 3 upon the property within the limits of an incorporated city or town, independent school district or incorporated school district in the Territory shall be assessed, collected and enforced in the manner prescribed by the property tax law of the municipality or district, by and at the expense of the municipalities and districts prorated proportionately between each, provided that amounts levied but which prove uncollectible, and the cost of foreclosure on delinquent accounts shall be borne by the city or school and public utility district.

All of the tax levied under this Act which is so collected shall be remitted to such municipalities or school districts as follows:

(a) As to cities which are not a part of an independent school district the municipal tax collection authority shall turn the amount of tax collected over to the city treasurer.

(b) As to incorporated school districts the tax collectors thereof shall turn the amount of tax collected over to the district school board.

(c) As to cities which are part of an independent school district the amount of taxes collected shall be turned over to the city treasurer. The city treasurer is hereby authorized and empowered to turn over to the school board such part of the funds collected as may be determined by the city council from time to time necessary to efficiently carry on school functions in said school district. Such cities may assess and collect an additional tax on real and personal property situate in the said cities not to exceed the amount allowed by law, which tax shall be assessed and collected at the same time and in the same manner as the tax provided in Section 3 of this Act, which said funds shall be used by said cities for general municipal purposes. Regarding that part of independent school districts outside of town bounds, the tax collection authority therein shall turn the taxes collected over to the district school board; provided that the millage levy for school purposes shall be uniform within incorporated school districts whether said district includes another incorporated municipality or not and any unused remainder up to the maximum levy hereunder shall revert to the Territorial Treasurer except

that portion collected within any incorporated municipality within the boundary of such school district in which case such remainder, unused for school purposes, shall revert to the treasury of the incorporated municipality in which it may be collected.

(d) Taxes collected hereunder within a public utility district shall be handled in a like manner to those collected in cities or other incorporated municipalities, including collection costs, remissions and school millage levy provisions as set forth herein.

(e) In all cases where such local units are to receive such tax collections, the local tax collection authority shall, upon delivery of the money as above set forth, obtain a receipt in duplicate therefor and forward the duplicate thereof to the Tax Commissioner. The time or times to be set for payment on account of such collections shall be prescribed by the Tax Commissioner. Such other accounting as may be indicated shall be made to the Tax Commissioner at such times and in such manner as may be prescribed by him.

The tax money so collected which remains after remissions have been made shall be transmitted to the Tax Commissioner at such intervals and in such manner as he shall direct, for deposit with the Treasurer, to be covered into the general fund of the Territory.

Section 5. TAX ON PROPERTY OUTSIDE INCORPORATED CITIES AND SCHOOL DISTRICTS. The tax levied under the provisions of Sec-

tion 3 upon property outside the limits of an incorporated city, independent school district, or incorporated school district or public utility district in the Territory shall be assessed, collected and enforced as provided in this Act.

Section 6. EXEMPTIONS.

(a) Property shall be exempt from taxation hereunder when used exclusively for education, religious, or charitable purposes.

(b) The property of the United States, of the Territory, and of any municipal corporation, independent school district, incorporated school district, public utility district and association operating utilities under arrangement with the Rural Electrification Administration, shall be exempt hereunder.

(c) The personal property of any person to the value of $200.00 shall be exempt hereunder.

(d) The property of any organization not organized for business purposes, whose membership is composed entirely of the veterans of any wars of the United States, or the property of the auxiliary of any such organization, and all monies on deposit belonging to such organization shall be exempt hereunder, except any such property which produces rentals or profits for such organization.

(e) The laws exempting certain property from levy and sale on execution shall not apply to taxes levied hereunder or to the collection thereof.

(f) New industrial, commercial and business construction shall be exempt during the period of construction and until the plants or buildings are occupied or operated, but in no case shall this exemption exceed three taxable years from the time of beginning of construction. Modifications and repairs to existing structures shall not be considered new construction under this provision.

(g) All homesteads upon which entry has been made in accordance with the land laws of the United States shall be exempt from the date of entry until one year after the date upon which patent shall have been granted and final title acquired. Such exemptions shall include all improvements upon such homesteads pertaining to residential or agricultural purposes.

(h) INDUSTRIAL INCENTIVE CLAUSE: The Tax Commissioner is authorized to grant incentive exemptions hereunder in the manner and to the extent hereinafter set forth:

(1) An exemption of one-half of the tax otherwise imposed hereunder, or such other lesser fraction thereof as the Tax Commissioner may deem to be a necessary and proper encouragement to new industry as hereinafter defined, for such period not exceeding 10 taxable years from the date production is commenced, upon new plants and buildings and other installations, real estate and equipment, as are constructed and procured by new industrial enterprises, as hereinafter defined, to manufacture or process products which

constitute industry new to Alaska with resultant establishment of new payrolls in Alaska.

The terms "new industry" or "new industrial enterprises" as used herein shall mean undertakings for the purpose of manufacturing or processing products not manufactured or processed in Alaska on the effective date hereof and for which plants have not already been established in Alaska.

(2) The Tax Commissioner shall establish and promulgate general standards and rules conformable to this Act for determining the eligibility of applicants for exemptions hereunder, and the extent to which exemptions for such applicants respectively are to be granted, including such factors as: permanence of the industry involved; the amount of its capital investment; whether it is a seasonal or continuous operation; whether it will likely be marginal because of distance from principal markets; transportation costs and differential in cost of production in Alaska as compared to cost of productions elsewhere; the number of resident Alaskan workmen who will be given employment; and other pertinent factors, related to improving the economy of the Territory of Alaska. He shall also consider in each case the recommendation of the Divisional Board of Assessment of the division in which the new industry is proposed to be established, which recommendation shall be obtained by the applicant in advance of the application and attached thereto. After all such factors are taken into consideration, the decision of the Tax Commissioner shall be rendered,

subject, however, to final approval of the Divisional Board of Assessment. If after studying the Tax Commissioner's findings and decisions, the said Board, acting by majority of its members, is unable to agree with said decision, it shall, after reasonable notice to the Tax Commissioner and the affected new industry, hold a hearing and make the decision, which shall be final, except that when such exemption decision expires, the position of the new industry may be re-evaluated and extension granted within the maximum limits allowed hereunder, in the same manner as provided for the granting of the original exemption.

(3) All exemptions granted hereunder shall be negotiated and consummated prior to the initial commencement of production by the applicant.

(4) Exemptions granted by the Tax Commissioner hereunder shall be applicable within or without municipalities, school districts or public utility districts.

Section 7. RETURNS.

(a) On or before the 15th day of July in the year 1949, and on or before the 15th day of March in each year thereafter, every person shall submit in duplicate to the assessor of the judicial division, a return of his property, and of the property held or controlled by him in a representative capacity, in the manner prescribed in this Act, which return shall be based on values existing as of January 1 in the same year.

* * *

Section 11. VALUATION. Property shall be assessed at its full and true value in money, as of January 1 of the assessment year. In determining the full and true value of property in money, the person making the return, or the assessor, as the case may be, shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, nor shall he adopt as a criterion of value the price for which the property would sell at auction, or at a forced sale, either separately or in the aggregate with all of the property in the taxing district, but he shall value the property at such sum as he believes the same to be fairly worth in money at the time of assessment. The true value of property shall be that value at which the property would generally be taken in payment of a just debt from a solvent debtor.

Section 12. ASSESSMENT. Every person shall be assessed and taxed annually on his property in the division in which the property is situated, and where any parcel of land is situated partly in one division and partly in another or partly within a municipality or school district and partly elsewhere, the assessment in respect of that parcel shall be made in the division or district within which the greater part of the property is situated. Real property and personalty shall be separately assessed.

Section 13. TO WHOM ASSESSED.

(a) Subject to subsection (b) and (c) of this section, property shall be assessed and taxed in the name

of the owner or claimant or where the property is owned, occupied or claimed by two or more persons, it shall be assessed and taxed in the names of the owners, occupiers or claimants jointly.

(b) Where a verified statement is furnished showing that property has become the subject of a contract of sale or been leased by the owner to another person, the name of the other person shall be noted on the assessment roll and like notice of the assessment shall be sent to him as to the owner, in which case the taxes assessed in respect of the property may be received either from the owner or from the purchaser or tenant, or from any optionee, prospective distributee, purchaser or encumbrancer who desires to safeguard the title to the property.

(c) Land of the United States or the Territory which is held under any mining location, lease, license, agreement for sale, accepted application for purchase, or otherwise, shall be assessed and taxed in the name of the occupier according to the value of his interest therein (except as above modified in this Act with respect to certain mining claims); but no assessment or taxation in respect of land so held or occupied shall in any way affect the rights of the United States in the land.

(d) Where the property assessed is owned by two or more persons in undivided shares, each owner shall be assessed on the undivided interest at the proportion of the assessed value of the property that his undivided interest bears to the whole.

Section 14. CONTENT OF ASSESSMENT ROLL.

(a) The assessor of each division shall prepare an annual assessment roll for each division covering property outside of municipalities and school districts and public utility districts, after consideration of all returns made to him pursuant to this Act, and after careful inquiry from such sources as he may deem reliable.

* * *

Section 15. ASSESSMENT NOTICE.

(a) The assessor, before completion of the assessment roll, shall give to every person named thereon a notice of assessment, showing the valuation and assessment of his property and the amount of taxes thereon, in such form as the Tax Commissioner may prescribe. At least 60 days must be allowed from date of such mailing within which to appeal to the Board against the assessment.

* * *

Section 16. COMPLETION OF ASSESSMENT ROLL. The assessor shall complete the annual assessment roll for the year 1949 on or before the 1st day of September and for each year thereafter on or before the 1st day of July of that year, which shall be based on values of January 1st immediately preceding, and shall certify the same by attaching thereto a certificate in a form to be prescribed by the Tax Commissioner. Such supplementary assessment rolls

shall be prepared and certified as may be deemed necessary or expedient.

* * *

Section 23. SITTINGS AND RECORDS OF BOARD. For the purpose of scrutinizing the assessment roll and its supplements, and taking corrective action thereon, or for hearing appeals in respect of any assessment roll, or from any assessment made under this Act, the Board in each division shall sit and adjourn from time to time as its business may require, and shall record its proceedings and decisions. During all periods when a Board is not in session, its records and decisions shall be kept by the assessor.

Section 24. NOTICES BY BOARD.

(a) Where the name of any person is ordered by the Board to be entered on the assessment roll, by way of addition or substitution, for the purpose of assessment, the Board shall cause notice thereof to be mailed by the assessor to that person or his agent in like manner as provided in Section 15, giving him at least 60 days from the date of such mailing within which to appeal to the Board against the assessment.

(b) Whenever it appears to the Board that there are overcharges or errors or invalidities in the assessment roll, or in any of the proceedings leading up to or subsequent to the completion of the roll, and there is no appeal before the Board in which the same may be dealt with, the Board may notify parties affected with the view of hearing them.

Section 25. APPEAL BY PERSON ASSESSED.

(a) Any person whose name appears on the assessment roll for any division or who is assessed in any district, may appeal to the Board with respect to any alleged overcharge, error, omission or neglect of the assessor.

(b) Notice of appeal, in writing, shall be filed with the Board within 60 days after the date on which the assessor's notice of assessment was given to the person appealing. Such notice must contain a certification that a true copy thereof was mailed or delivered to the assessor. If notice of appeal is not given within that period, right of appeal shall cease, unless it is shown to the satisfaction of the Board that the taxpayer was unable to appeal within the time so limited.

(c) A copy of the notice of appeal must be sent to the assessor as above indicated.

* * *

Section 27. NOTICE OF HEARING. Not less than 30 days before the sittings at which the appeal is to be heard, the Board shall cause a notice to be mailed by the assessor to the person by whom the notice of appeal was given, and to every other person in respect of whom the appeal is taken, to their respective addresses as last known to the assessor. The form of such notice shall be prescribed by the Tax Commissioner.

Section 28. HEARING OF APPEAL.

(a) At the time appointed for the hearing of the appeal, the Board shall hear the appellant, the assessor, other parties to the appeal and their witnesses, and consider the testimony and evidence adduced, and shall determine the matters in question on the merits and render its decision accordingly.

(b) If any party to whom notice was mailed as above set forth fail to appear, the Board may proceed with the hearing in his absence.

(c) The burden of proof in all cases shall be upon the party appealing.

* * *

Section 30. COLLECTION UNAFFECTED BY APPEAL. Neither the giving of a notice of appeal by any taxpayer, nor any delay in the hearing of the appeal by the Board shall in any way affect the due date, the delinquency date, the interest, or any liability for payment provided by this Act in respect of any tax which is the subject matter of the appeal. In the event of the tax being set aside or reduced by the Board on appeal, the Tax Commissioner shall refund to the taxpayer the amount of the tax or excess tax paid by him, and of any interest imposed and paid on any such tax or excess.

Section 31. APPEAL TO COURT. Any person feeling aggrieved by any order of the Board shall have the right of appeal on a de novo basis to the District

Court for the Territory of Alaska in the division in which the matter is pending. Such appeal shall be pursued as nearly as may be in accordance with the procedure prescribed in Sections 68-9-4 to 68-9-14 inclusive, Alaska Compiled Laws Annotated 1949, governing appeals from a Justice's Court in civil cases and the Tax Commissioner shall promulgate uniform regulations adapting the above referenced procedure for perfecting such appeals.

Section 32. TIME OF PAYMENT. Taxes for a calendar year shall be payable annually the first day of February of the ensuing year. Failure to pay on said due date shall cause the tax to become delinquent and shall subject the property assessed to the interest and penalty additions hereinafter provided. Payments of taxes may be made at any time before their due date, but no discount shall be allowed for such early payment.

* * *

Section 34. LIEN.

(a) The taxes assessed upon property, together with interest and penalty, shall be a lien thereon from and after assessment until paid, and no sale or transfer of such property shall in any way affect the lien of such taxes.

(b) Liens for taxes hereunder shall be first liens and paramount to all prior and subsequent encumbrances, alienations and descents of the property.

Section 35. INTEREST.

(a) For failure to pay taxes when due, interest inclusive of penalty at the rate of one percent per month shall be added on the first of each month until the tax is paid or the property sold hereunder, but not to exceed the legal rate of interest in the aggregate.

(b) Where a tax becomes payable in respect to property assessed on a supplementary assessment roll, the like interest shall be added to and recovered as a part of the tax as might have been imposed if the return and the assessment had been made at the time prescribed by this Act and the tax had been duly levied and had not been paid.

* * *

Section 42. RECOVERY OF UNPAID LIENS. On or after the first day of April of any year, the Tax Commissioner may, with the assistance of the Attorney General, file in the office of the clerk of the district court in the division in which property subject to delinquent taxes is situated, a list of all parcels affected by unpaid liens. Thereafter the Tax Commissioner shall, unless the matter be otherwise resolved, proceed to foreclosure of said liens in substantially the manner prescribed in Sections 22-2-8 to 22-2-18, both inclusive, of Alaska Compiled Laws Annotated 1949, for the foreclosure of land registration liens, and all pertinent provisions of said sections are hereby adopted as applicable hereto.

Section 43. BOARDS OF ASSESSMENT AND EQUALIZATION.

(a) There is hereby created and established for each judicial division a Board of Assessment and Equalization.

* * *

(f) Each Board, within its judicial division, shall have the power and duty, subject to the approval of the Tax Commissioner as to all expenses of Board operations, to: —

(1) Exercise general supervision and direct the activities of assessment and equalization of property taxes;

* * *

(4) hold hearings and conduct investigations required in the administration of the assessment provisions of this Act and hear and determine appeals involving assessment of property, at such points in their respective divisions as will serve the general convenience of the public, provided that written minutes may be kept of the testimony of witnesses without making a word by word record thereof;

* * *

(8) perform all duties specifically imposed and exercise all powers conferred upon the Board.

Section 44. TAX COMMISSIONER. The Tax Commissioner shall be the collector of taxes levied

under this Act and enforce collections with the aid of such divisional collectors or other deputy collectors and personnel as he may see fit to appoint. He shall administer all provisions of this Act except those specifically assigned to a board or under the purview of municipal or school district authority. The Tax Commissioner shall prescribe and furnish all necessary forms, and promulgate and publish all needful rules and regulations conformable herewith for the assessment and collection of any tax herein imposed, and shall voucher for expenditures according to law.

Section 45. SEVERABILITY CLAUSE. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and such application to other persons or circumstances shall not be affected thereby.

Section 46. EMERGENCY CLAUSE. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

Approved February 21, 1949.

* * * * * * *

Chapter 88, Session Laws of Alaska, 1949

Section 1. Section 3 of the Alaska Property Tax Act which was House Bill No. 2 of this session of the Legislature, is hereby amended by adding thereto at the end thereof the following language:

> With respect to any boat or vessel engaged in marine service on a commercial basis and subject to the provisions of this Act, the owner of said boat or vessel may elect:
>
> (a) To pay the tax levied hereunder on such boat or vessel on the basis of the value thereof as defined herein, or,
>
> (b) To pay $4.00 per net ton of such vessel's registered tonnage, but in any event the amount payable hereunder, for each such boat or vessel, shall not be less than $20.00 per annum.

Approved March 23, 1949.

APPENDIX B

Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, as amended June 3, 1948, c. 396, 62 Stat. 302, 48 USCA §78.

All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the true and full value thereof, except that unpatented mining claims and non-producing patented mining claims, which are also unimproved, may be valued at the price paid the United States therefor, or at a flat rate fixed by the legislature, but if the surface ground is used for other than mining purposes, and has a separate and independent value for such other purposes, or if there are improvements or machinery or other property thereon of such a character as to be deemed a part of the realty, then the same shall be taxed according to the true and full value thereof.

Alaska Compiled Laws Annotated, 1919, §48-7-1.

(a) (*Tax paid under protest.*) Whenever any taxes shall have been paid to the Tax Commissioner under protest and such taxes shall have been covered into the treasury, and the taxpayer or taxpayers involved have recovered judgment against the Tax Commissioner for the return of such tax, or where, in the absence of such judgment it shall become obvious to the Tax Commissioner, that such taxpayer would obtain judgment against the Tax Commissioner for recovery of such tax if legal proceedings therefor were prosecuted by him, it shall be the duty of the Tax

Commissioner, if approved by the Attorney General and the Treasurer, to issue a voucher against the general fund of the Territory for the amount of such tax in favor of such taxpayer.

* * *

No. 12,675

IN THE

United States Court of Appeals

For the Ninth Circuit

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,
Appellant,

vs.

LUTHER C. HESS and ALASKA JUNEAU GOLD MINING CO., a corporation,
Appellees.

Upon Appeal from the District Court for the Territory of Alaska, Fourth Division.

BRIEF FOR APPELLEES.

H. L. FAULKNER,
Juneau, Alaska,
MEDLEY & HAUGLAND,
1011 American Building, Seattle, Washington,
COLLINS & CLASBY,
Fairbanks, Alaska,
FAULKNER, BANFIELD & BOOCHEVER,
Juneau, Alaska,
Attorneys for Appellees.

Subject Index

Page

Jurisdiction 1

Questions presented 2

Statement 2

Argument 10

I. Is the Alaska Property Tax Act a valid act and does it contravene the uniformity clause of Section 9 of the Alaska Organic Act as amended? (62 Stat. 302: 48 USCA Sec. 78.) 11

A. Are the standards of equality and uniformity demanded in Section 9 of the Organic Act and the Fourteenth Amendment fulfilled whether they are the same or not? 11

B. Has the Legislature adopted a broad classification in the Act which sets standards of equality and uniformity? 14

C. Does the fact that the property tax ordinances of the various municipalities and school district differ invalidate the Act? 18

D. Have appellees been the victims of unconstitutional discrimination? 21

E. Do the provisions of Section 11 of the Property Tax Act comply with the requirements of the Organic Act? 22

II. Are the provisions for the taxation of mining claims in accordance with the amendment to the Organic Act of June 3, 1948? (Appendix B, page 63 of Appellant's Brief.) 23

III. Does a court of equity have jurisdiction to enjoin the enforcement of the tax under the pleadings and evidence in this case? 26

(1) There is no remedy at law 27

(2) Plaintiffs would suffer irreparable injury unless the defendant were enjoined 30

Page

(3) The levy of this tax creates a lien on the property of plaintiff and intervenor which constitutes a cloud on the title of their real property..... 32

(4) Equity jurisdiction was necessary to prevent a multiplicity of suits 33

IV. Other defects which were alleged in appellant's complaints and which are apparent on the face of the law.. 35

(1) The District Court, in its opinion, said that the lack of a Board of Equalization would not in itself show a lack of uniformity in the tax imposed by Chapter 10. (R. 52-53.) 36

(2) After the Alaska Property Tax, Chapter 10 of the Session Laws of 1949, was passed, and at the same session, the same Legislature passed Chapter 88, which is an amendment of Section 3 of Chapter 10 of the Alaska Property Tax Act..... 40

Conclusion 42

Table of Authorities Cited

Cases	Pages
Davis v. Forrestal, 144 N.W. 423	35
Davis Mfg. Co. v. Los Angeles, 189 U.S. 207	35
Educational Film Corp. v. Ward, 282 U.S. 379	29
Gammill Lumber Co. v. Board of Supervisors, 274 Fed. 630 (Nev.)	33
Gibbs v. Buck, 307 U.S. 66	31
Hillsborough Township v. Cromwell, 326 U.S. 620	27
Hopkins v. Southern California Telephone Company, 275 U.S. 393	29
Huidekoper v. Hadley, 177 F. 1	39
Huron-Clinton Met. Au. v. Board of Supervisors, 8 N.W. (2d) 84	38
Hynes v. Grimes Packing Company and others, 93 U.S. Law Edition 964	27
King County, Wash. v. Nor. Pac. Ry. Co., 196 F. 323	33
Lee v. Bickell, 292 U.S. 415	34
Madden v. Kentucky, 309 U.S. 83	12, 14, 43
Maelty v. Tantges, 52 N.W. 858	39
Mathews v. Rogers, 284 U.S. 581, S.R.	30, 43
Pacific Export Co. v. Seibert, 44 Fed. 310, affirmed 142 U.S. 339	31
People v. Orvis, 133 N.E. 787	39
Port Angeles Western R. Co. v. Clallam County, 20 F. (2d) 202	33
Railroad & Telephone Co. v. Board of Equalizers, 85 F. 302	37
Raymond v. Chicago Union T Company, 207 U.S. 20	27
Redman v. Wisenheimer, 283 P. 363, 102 Cal. App. 488	39
Royster Guano Co. v. Virginia, 253 U.S. 412	43

Pages

Shaffer v. Carter, 252 U.S. 37 43
Smith v. Shibeck, 24 At. (2d) 795 31
Southern California Telephone Company v. Hopkins, 13 F. (2d) 814 ..... 27, 29, 35

Terrace v. Thompson, 263 U.S. 197 27

United Globe Mines v. Gila County, 100 Pac. 744 39

Wagner Electric Corporation v. Hydraulic Brake Co., 257 N.W. 884 31
Welch v. Henry, 305 U.S. 134 22
Westmoreland Coal Co. v. Rothensies, 13 F. Supp. 321 31
Winslow v. Fleischner, 223 P. 922 31

Codes and Statutes

Act of Congress of June 3, 1948 (62 Stat. 302, 48 USCA, Section 78) 23

Act of June 6, 1900, c. 786, Section 4 (31 Stat. 322, as amended, 48 USCA, Section 101) 2

Alaska Compiled Laws Annotated:
Section 16-1-35, 9th Sub. 19
Section 16-1-111 19
Section 37-3-23 19
Section 48-7-1(a) 28, 32

Alaska Organic Act (62 Stat. 302; 48 USCA, Sec. 78):
Section 9 ..... 7, 11, 12

Alaska Property Tax Act, Chapter 10, Session Laws of Alaska 1, 2, 3, 7, 29, 42
Section 3 ..... 3, 42
Section 4 ..... 3, 10
Section 5 4
Section 6 4
Section 7 4
Section 11 ..... 4, 5
Section 12 5
Section 13 5

Pages

Section 14 5
Section 15 5
Section 16 5
Section 34 ..... 5, 32
Section 35 5
Section 42 5
Section 43 5

New Federal Judicial Code, Section 1291 2

Session Laws of Alaska, 1949:
Chapter 88 ..... 1, 40, 41, 44
Chapter 88, Section 1, subdivision (b) 41

Texts

61 C.J., "Taxation," Section 65 39

61 C.J., "Taxation," Section 922 39

Constitutions

Constitution of the United States, Fifth and Fourteenth Amendments 7

No. 12,675

IN THE

United States Court of Appeals

For the Ninth Circuit

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,
Appellant,

vs.

LUTHER C. HESS and ALASKA JUNEAU GOLD MINING CO., a corporation,
Appellees.

Upon Appeal from the District Court for the Territory of Alaska, Fourth Division.

BRIEF FOR APPELLEES.

JURISDICTION.

This is a suit to enjoin the appellant from enforcing the provisions of the Alaska Property Tax Act, Chapter 10, Session Laws of Alaska, 1949, as amended, and to have declared invalid the Act in its entirety. Judgment and decree was entered on August 1, 1950, declaring the Act invalid in its entirety, with the exception of the amendment thereto contained in Chapter 88, Session Laws of Alaska, 1949, and

granting a permanent injunction. (R. 89-92.) An appeal was taken on August 7, 1950, by filing with the District Court a notice of appeal. (R. 88.) The jurisdiction of the District Court was invoked under the Act of June 6, 1900, c. 786, Secs. 4, 31 Stat. 322, as amended, 48 USCA Sec. 101. The jurisdiction of this Court rests on Sec. 1291 of the New Federal Judicial Code.

QUESTIONS PRESENTED.

1. Whether Chapter 10, Session Laws of Alaska, 1949, known as the Alaska Property Tax Act, is a valid exercise of the taxing authority of the Territory of Alaska.

2. Whether an injunction should have been issued enjoining the enforcement of the provisions of the Alaska Property Tax Act.

STATEMENT.

The appellant, in his brief, has set forth, commencing on page 2, a statement of the action brought in the District Court for the Fourth Judicial Division of Alaska, and the various steps which were taken in the case which resulted in a judgment for the appellees and the issuance of a permanent injunction enjoining the appellant from enforcing the provisions of what is known as the Alaska Property Tax Law contained in Chapter 10, Session Laws of

Alaska, 1949, as amended by Chapter 88 of the Session Laws of the same year, a copy of which law is set forth as Appendix A, commencing at page 43 of appellant's brief. We believe that the statement of the case, to be complete, must point out the pertinent sections of Chapter 10, Laws of Alaska 1949, and the several grounds of invalidity urged by appellees at the trial.

The Alaska Property Tax Act, a copy of which is found in the appendix to appellant's brief, purports to levy a tax of 10 mills on all real and personal property within the Territory, commencing with the calender year 1949, at the true and full value of the property, excepting as to unimproved, unpatented mining claims which are not producing, and non-producing patented mining claims upon which the improvements required for patent have become useless through deterioration, removal or otherwise, the value is fixed at $500.00 per each 20 acres or fraction of each such claim. The tax on boats and vessels used on a commercial basis is levied on the basis of either the value of the boat or vessel or at the rate of $4.00 per net ton registered tonnage, and the owner may elect to choose between these two methods of valuation.

Section 4 of the Act provides that the tax levied under the provisions of Section 3 upon property within the limits of any incorporated city or town, independent school district or incorporated school district, shall be assessed, collected and enforced in the manner prescribed by the Property Tax Law

of the municipality or district by and at the expense of the municipality and district, and such tax levied within the limits of municipalities or school districts shall be retained by the municipalities and districts. In other words, the tax within those municipalities and districts is assessed, collected, enforced and proceeds thereof retained by the municipalities and districts.

The tax collected under the law on property within a public utility district is handled in the same manner.

Under the provisions of Section 5, all taxes collected on property outside of municipalities, school districts and public utility districts is to be transmitted to the tax commissioner and covered into the general fund of the Territory.

Section 6 provides certain exemptions of property from taxation. These exemptions, it will be seen hereafter, are not the same as the exemptions allowed by the laws of the Territory to property within municipalities and school districts.

Section 7 fixes the date of returns to be made by the taxpayers to the tax commissioner. This date is July 15 in the year 1949 and March 15 each year thereafter, and the property is to be valued by its owners as of January 1st of the year in which the return is made.

Section 11 provides that property shall be assessed at its full and true value in money as of January 1st of the assessment year. This section also pro-

vides that the assessor shall value the properties at such sum as he believes the same to be fairly worth in money at the time of assessment. Then the last sentence of Section 11 provides that the true value of property shall be that value at which the property would generally be taken in payment of a just debt from a solvent debtor.

Sections 12, 13 and 14 provide for the assessment of property in the Territory outside of municipalities, school districts and public utility districts.

Section 15 provides for assessment notices and Section 16 for the preparation of an annual assessment roll.

Then there are various sections relating to the assessment rolls and the records of the boards, and notices of hearings and appeals to the board from the action of the assessor, hearings on the appeals to the several divisional boards, and from the boards to the Court, and the time of payment, etc.

Section 34 provides that the taxes, together with interest and penalty, are a lien upon the property assessed from and after the assessment until paid.

Section 35 provides for the payment of interest not exceeding the legal rate of interest, which, in Alaska, is 6% per annum.

Section 42 provides for the foreclosure of unpaid liens.

Section 43 sets up boards of assessment and equalization. There is one board for each judicial divi-

sion and these boards are empowered to hold hearings and conduct investigations in connection with administration and the assessment provisions of the act. It will be noted, however, that these boards are divisional boards. That is to say, there is one separate board set up for each judicial division of the Territory, and there is no common or general or territorial board. In other words, there is no connection between the several boards of assessment and equalization and no general board of equalization to equalize the value of property situated in the several judicial divisions nor to equalize values within incorporated cities, school districts and public utility districts with values of similar property outside those districts.

Municipalities and school districts in Alaska have had the power to tax property within their boundaries for many years, and that power exists as it has for the past 25 years or more with a few changes, the chief one of which is that the limit of their taxing power for municipal purposes has been increased from 2% to 3% by Congress.

The cities levy a general tax on all real and personal property for school and municipal purposes, and the school districts levy a tax on all property within their confines for school purposes. The city tax goes for general municipal purposes, such as street improvements, fire protection, public health, sewers, public buildings, and a part for schools.

The taxes levied by municipalities and school districts are, under the laws of the Territory, levied,

assessed, equalized, collected and enforced in accordance with municipal ordinances. These ordinances provide the dates of assessment, the dates when taxes become due and delinquent, rates of penalty and interest on delinquency, provisions for equalization and for a hearing in Court in case of dispute over values, and lien provisions and provisions for the sale of property for delinquent taxes and the redemption thereof by the owner.

The city ordinances in the Territory providing for the levy, assessment, collection and enforcement of taxes in the several municipalities are nearly all different. They are different as to dates, time of payment, rate of penalty and of interest, etc. This is also true with reference to school districts. Some of the cities, notably Juneau and Douglas, which are involved in this case, provide for a discount for the payment of taxes on or before a certain date. Other cities provide for no such discount.

The plaintiff and intervenor contended that Chapter 10 of the Session Laws of Alaska, 1949, as amended by Chapter 88, was void for the following reasons:

(1) It is violative of the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States;

(2) It sets up a system of taxation which is not uniform and therefore is in violation of Section 9 of the Organic Act;

(3) The terms and provisions of the Act and the amendment thereto are vague, uncertain, indefinite and impossible of reconciliation and in some instances inconsistent with each other;

(4) There is no adequate provision in the statutes of the Territory for the recovery of the tax, if paid, and the law is thereafter held to be invalid;

(5) There is no overall or territorial board of equalization and therefore a taxpayer has no means of ascertaining through any administrative step which he can take whether the tax levied upon his property is excessive or whether the values are the same on his property as on property of the same nature and value which might be situated in another judicial division;

(6) The part of the tax collected by municipalities, school and public utility districts is to be used for local, municipal or district purposes in which the territory outside of such municipalities and districts derives no benefit;

(7) The part of the tax collected by the Territory is to be used for territorial purposes in which the municipalities and school districts and the inhabitants thereof benefit to the same extent as the residents of areas outside those municipalities and districts, thereby giving a preference to the municipalities and districts as against the outside areas;

(8) The dates for assessment, valuation returns, payment and the attachment of liens may vary as between the several groups and individual members of

groups of taxing districts, thereby giving different results;

(9) The lien arising against real property within cities and school districts upon which taxes have not been paid is enforced in one manner while a similar lien arising against property outside of those taxing units is enforced in an entirely different manner and in the one case a two-year period of redemption is provided where property is sold for unpaid taxes, while in the Territory outside of those districts no period of redemption whatsoever is allowed;

(10) There are different criteria for valuation of mining property and boats as against other property;

(11) There are substantial variations as to exemptions between the different types of taxing districts;

(12) There is no method provided in Chapter 10 or in any other law for equalization of assessments as between different municipalities or districts or between any of these and the outside areas or of assessments in outside areas in the different judicial divisions;

(13) There is no uniform system of assessment appeals;

(14) There are substantial differences in the personal liability of taxpayers depending upon the taxing unit in which their property is situated;

(15) There are substantial differences in the penalties and interest charges to which different tax-

payers are liable, depending upon their taxing district (this will appear by an examination of the various city ordinances introduced and a comparison of the penalties and interest charges therein contained with those contained in the territorial tax law). (R. pp. 96 to 122.)

(16) Uniformity as required under the law is wholly lacking and the provisions of Section 4 of the Act actually exempt from the tax all property situated within municipalities and school and public utility districts by permitting them to assess and collect the tax in their own way, at their own rates, under their own ordinances and retain it, or to decline to assess or collect any portion of it.

The District Court for the Fourth Judicial Division of Alaska, held the Alaska property tax law to be invalid, after having made and filed its findings and conclusions, and it entered judgment and decree on August 8, 1950, enjoining the defendant from enforcing it. (R. 89 to 92, inclusive.)

ARGUMENT.

We shall endeavor to answer the argument contained in appellant's brief in the order in which it is presented.

I. IS THE ALASKA PROPERTY TAX ACT A VALID ACT AND DOES IT CONTRAVENE THE UNIFORMITY CLAUSE OF SECTION 9 OF THE ALASKA ORGANIC ACT AS AMENDED? (62 Stat. 302: 48 USCA Sec. 78.)

A. Are the standards of equality and uniformity demanded in Section 9 of the Organic Act and the Fourteenth Amendment fulfilled whether they are the same or not?

Section 9 of the Alaska Organic Act, a copy of which is found in Appendix B on page 63 of appellant's brief, reads as follows:

> "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the true and full value thereof, except that unpatented mining claims and nonproducing patented mining claims, which are also unimproved, may be valued at the price paid the United States therefor, or at a flat rate fixed by the legislature, but if the surface ground is used for other than mining purposes, and has a separate and independent value for such other purposes, or if there are improvements or machinery or other property thereon of such a character as to be deemed a part of the realty, then the same shall be taxed according to the true and full value thereof."

The Fourteenth Amendment to the Constitution of the United States provides:

> "No state shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws."

Counsel cites, on pages 12 to 16 of his brief, a number of decisions of this Court and the United

State Supreme Court with reference to uniformity required in license and excise tax cases, but in none of these cases do we find the Courts upholding a law similar to the Alaska Property Tax Act, where most of the taxable property in the Territory, i.e., that situated within municipalities and school and public utility districts, is exempted.

The cases cited deal with classification of property where all taxpayers are treated alike. A typical case is that of *Madden v. Kentucky,* 309 U.S. p. 83. In that case, the law of Kentucky provided for a tax on bank deposits, and the tax on deposits of all residents of Kentucky was at one rate for deposits situated within the state and at a higher rate for deposits situated elsewhere. The Court held that the Fourteenth Amendment was not violated by this law, but it will be observed that all citizens of Kentucky were treated alike and all bank deposits were treated alike. That is to say, those within the state were all taxed at one rate, and those outside the state all at another rate. Thus no question of discrimination as to property wholly within the state is involved. The decision does not state just what the Constitution of Kentucky provided. But in Alaska we have the Organic Act, and what becomes of the provisions of Section 9 under a law such as the Alaska Property Tax Act? Surely the uniformity provision is violated. If a Kentucky tax had been upheld by the Supreme Court in the face of a Constitution which provided that all taxes should be uniform upon the same class of subjects and this law levied one rate

in the city of Frankfort under one set of rules and laws and another tax in the hill country, then it might be in point, but we think it is not applicable here.

The Alaska law was designed to exempt from the tax all property within municipalities and school districts. While it is true that the tax is purported to be levied on all property everywhere in all taxing districts, a virtual exemption is sanctioned by allowing the cities and school and public utility districts to assess, collect and enforce the tax under entirely different ordinances and laws, at different rates and to retain it if it is collected at all, or to refuse to assess or collect any portion of it, as the record shows was the case in the municipalities of Juneau, Fairbanks and Douglas and in the Douglas and Fairbanks school districts in this case. (Finding No. 3, R. 78.) There do not appear to be any Court decisions which hold that such a law meets the requirements of either the Fourteenth Amendment or of the Alaska Organic Act, or any State Constitution containing similar provisions.

The Alaska Property Tax Act in effect simply levies a tax of 10 mills on all property outside municipalities, school districts and public utility districts for Territorial purposes under certain terms and conditions, and provides for its assessment, collection and enforcement under procedure set up in the Act, and it then permits the cities, school and public utility districts to simply increase their own taxes, not exceeding 10 mills, in their own way, ac-

cording to their own ordinances, with all the differences they contain from the Territorial tax as to valuations, assessments, dates for payments, discounts, equalization, enforcement, interest, penalties, exemptions, personal liability, liens, redemptions from sale, etc. (See R. 96 to 122, inclusive.)

Classification of property for taxation, if the classification has a reasonable basis and is not arbitrary, is one thing, but exemption from taxation whether directly provided in so many words or appearing upon the face of the statute as a whole and from its operation, as is the case in Alaska, is something quite different and does not appear to square with either the uniformity provision of the Organic Act or with the equal protection clause of the Fourteenth Amendment.

B. Has the Legislature adopted a broad classification in the Act which sets standards of equality and uniformity?

The record in this case shows that there was no classification of property under the Alaska law, and certainly none such as was involved in the case of *Madden v. Kentucky,* cited by appellant, but there was made two wholly different systems of taxation applying to different parts of the Territory or different taxing districts, and having no uniformity in any respect, as we have pointed out hereinabove. But appellant, after having argued that these two wholly different systems of taxation, under different laws and many different ordinances are really classification of property, proceeds next to advance a theory, not supported anywhere in the law, for this so-called

classification. Briefly, the theory is that within municipalities the Territory, before the passage of the Act in question, contributed from 75% to 85% of the expenses of the schools, depending upon the school enrollment, in the various cities and school districts, while paying the entire expenses of the rural schools outside of municipalities and school districts (R. 144 and 145); that because the property owners in cities were required to pay from 15% to 25% of the expenses of their schools, the legislature properly accorded them the tax exemption which is provided in the Alaska Property Tax Act so that property outside of cities and school districts should pay the tax into the Territorial treasury while taxpayers owning property within cities and school districts should be relieved of the tax, or if levied under their own laws, be permitted to keep it.

This is wholly a theory of appellant. There is nothing in the law to even hint that such was the intent of the Legislature and there is no such declaration of policy. Let us see how that would work. The record shows that within the City of Fairbanks the total taxable property in the year 1949 was $16,060,624.00, and in the Fairbanks school district outside of the City of Fairbanks the assessed value for the year 1949 was $13,532,279.00. This makes a total of $29,592,903.00. (R. 136 and 137.) A Territorial tax levied on that at 1% would amount to $295,929.03. The entire school budget of the Fairbanks school district, i.e., the district which includes the city and the outlying area contained in the district, for 1949

and 1950 shows $210,575.50. (R. 136.) Thus if the Fairbanks school district, which includes the City of Fairbanks, should use the Territorial property tax of 1% as an offset against the entire expense of its schools it would be receiving $295,929.03 as against an expenditure of $210,575.50, and this would result in a profit or advantage to the school district of $85,-354.53. But that is not all, for the law of the Territory, which provides that the Territorial treasury shall pay three-fourths of the cost of schools within the Fairbanks school district, was not changed, so that the city would have over $295,000.00 additional tax money under the Alaska Property Tax Law to offset not $210,575.50, but against only one-fourth of that, as that is the only portion the cities and school districts pay toward the expense of their schools. The advantage to the Fairbanks school district, therefore, would be over $241,000.00 instead of $85,354.53. It would certainly seem that if any such theory had been in contemplation of the Legislature when the law was passed, the members would certainly have at least adjusted the matter of payment of school expenses, and instead of paying three-fourths of that expense they would have allowed the cities and school districts, with the vastly increased revenues which would be available, to pay all their own school expenses. Even this would have given the Fairbanks school district, for instance, a greater advantage over the rural areas, and the same would hold true for all other municipalities and school districts.

Mr. William K. Liese, tax assessor for the Fourth Judicial Division, testified that the value of all property in the Fourth Division, outside of incorporated cities and school districts, listed to the date of May 15, 1950, 16½ months after the levy of the tax took effect, was only $11,380,798.30, or a little more than one-third of the property in the Fairbanks school district alone. (R. 162.) It will be seen, therefore, that by far the greater part of the taxable property in the Territory is within cities and school districts, and therefore subject to escape the Alaska property tax, which is levied on property outside cities and school districts.

It has been thought necessary to suggest that another reason for the so-called classification, or what we maintain is an exemption, is that those who own property outside of municipalities and school districts have heretofore escaped taxation while those within the cities and school districts have paid taxes for school and municipal purposes within those districts. This is not so. In the first place, the munipical taxes and the school taxes are expended entirely for school and municipal purposes, including streets, sewers, fire protection, public buildings, sanitation, and scores of other things which are not available to those in the rural areas, and secondly, property in the rural areas has heretofore provided the greater bulk of the Territorial revenue through license, excise and other taxes, and these go not only to support the small rural schools, but to pay an average of from 75% to 85% of the cost of the city and dis-

trict schools in addition to other governmental expenses. The Court will take judicial notice of the fact that the fisheries and mines are the chief contributors to the revenue of the Territory and they have been for many years, and they have paid and are paying now, heavy taxes. Practically all their property is situated in rural areas outside of incorporated cities and towns, and a very small portion of the Territorial revenues has been contributed from within municipalities and school districts. Thus it appears that appellant's entire argument on this point has been based on his premise that the Alaska legislature, prior to 1949, had legislated so that an inequality or discrimination existed against the taxpayer in the cities and school districts. And, assuming that such discrimination existed, appellant seeks to justify his position by assuming further that the Legislature now intended to reverse the situation and to require rural taxpayers to pay the full 1% tax to the Territorial tax commissioner, while the taxpayer in the cities and school districts may do what their own consciences dictate in the matter of imposing the tax or collecting it. There is nothing in the record to support appellant's assumption or the argument based thereon.

C. Does the fact that the property tax ordinances of the various municipalities and school district differ invalidate the Act?

Appellant begins his discussion of this portion of his argument by adopting the fallacious premise that the Legislature has used a legitimate broad power of classification to more equitably distribute the cost

of government between the two classes of taxpayers, i.e., those owning property in rural areas and those owning property in cities and school districts. He then states that the differing provisions of the several tax ordinances of the cities and school districts can have no bearing upon the legislation because the Legislature, having the power to classify can also adopt sub-classification. He fails to point out wherein we have, in this case, a rational basis for either classification or sub-classification, or to discuss the difference between classification and exemption.

We do not contend that the substantial differences in the tax ordinances of the various municipalities and school districts, which are all set up according to law, alone invalidate the Act. But we do contend that the Act lacks uniformity because it applies one standard of values, one method of assessment and collection and enforcement, to property outside of cities and school districts while leaving it to the municipal and school district authorities to either assess, collect and enforce the same tax at a different rate and in a different manner and retain it for their own purposes, thereby setting up several different standards and different procedures within the various municipalities and school districts, or to ignore it altogether, as was the case in the cities of Fairbanks, Douglas and Juneau and the Fairbanks and Douglas school districts in 1949. (R. 78 and 79.)

Municipal and school district taxes are levied for general municipal and school purposes (ACLA Secs. 16-1-35, 9th Sub.; 16-1-111 and ACLA 37-3-23.)

The Alaska Organic Act originally limited municipal taxes to 20 mills. Congress in 1948 amended the Act by increasing the limit to 30 mills. (R. 56.)

We think it sufficient to say that with all the differences in the municipal and school district ordinances, even if the 10 mill tax levied by the Alaska Property Tax Act were provided to be actually collected by the cities and school and public utility districts and covered into the Territorial treasury for general Territorial purposes, still, if assessed, collected and enforced in accordance with the widely differing provisions of the local ordinances, the tax would lack uniformity and no question of justification on the ground of classification could possibly arise. We have here no device for "distributing the cost of government among those who enjoy its benefits", which would justify any classification, much less an exemption of by far the great portion of all the property in the Territory.

The Alaska Property Tax Act is another example of hastily conceived and hurriedly enacted legislation. It is apparent on the face of the law that it was intended to exempt all property in cities and school and public utility districts because the entire assessment, collection, enforcement and disposition of taxes within those taxing units is left to the local authorities under their own laws, and the Act gives the Territory no control and no power to interfere if they ignore the law and refuse to assess any Territorial tax at all, as was the case in the five municipalities and school districts involved in this case.

If appellant's theory is correct, or even partially correct, and the Legislature had in view the object of favoring municipalities and school districts, it no doubt could have passed a general uniform law as required by the Organic Act, providing for the levy, assessment and collection of a tax on all property, wherever situated in the Territory, and then adjusted the school expenses by assuming the entire cost and expense of schools within cities and school districts, including the cost of repairs and additions to school buildings.

D. Have appellees been the victims of unconstitutional discrimination?

It is contended that since the appellees paid the taxes levied by the cities of Juneau, Fairbanks and Douglas and the Fairbanks, Juneau and Douglas school districts, and those taxes were the same as though the Alaska Property Tax Act had not been passed, i.e., the municipal and school district taxes, they may not now be heard to complain that the property taxes in the Territory levied by the Act, under attack, are not uniform.

It is difficult to see how this could be. Taxes were demanded of the appellees on property outside cities and school districts, while under the same law similar property of others which might be situated within a city or school district was not taxed, but, in effect, exempted.

We are not complaining of lack of uniformity in the various cities and school districts as between

themselves. That is permitted under the municipal and school district law. Our complaint is that the taxes sought to be enjoined are demanded to be paid by appellees on certain property, while similar property of others escapes taxation because of geographical location.

The Wisconsin case of *Welch v. Henry,* 305 U.S. p. 134, cited by appellant, is not in point, for there all taxpayers in the same class were treated alike. An income tax was involved. Thus no question of geographical exemption. It was a general tax and all the proceeds were paid into the State treasury.

E. Do the provisions of Section 11 of the Property Tax Act comply with the requirements of the Organic Act?

The Organic Act referred to hereinabove, in Section 9 as amended, provides that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to true and full value", etc., with the exception of mining claims, which are treated differently.

Section 11 says that the assessor "shall value the property at such sum as he believes the same to be fairly worth in money at the time of assessment", and again it defines true value as "that value at which the property would generally be taken in payment of a just debt from a solvent debtor".

This establishes, at best, conflicting standards of value, neither of which is based on true and full value. In the one instance it is left to the whim of

the assessor and there is no uniformity and no standard. There are four assessors in the four judicial divisions independent of each other, with no connecting link between them and no central equalization board. One assessor might be an optimist and another a pessimist, and the results might be widely different. In the other instance, where a standard of value is attempted to be defined, we might have a solvent debtor owning, let us say, an inoperative cannery. He might owe some man $50,000.00, who would say to him: "I shall agree to take the cannery at $50,000.00 in satisfaction of the debt". The offerer might be someone who knew nothing about canneries but who intended to dismantle the plant and sell the machinery and lumber. At the same time, someone else who was experienced in operating canneries, but not a creditor, might be willing to pay $100,000.00 for the property, to be used for canning purposes.

The Court below found this provision of the law to be in conflict with the Organic Act. (R. 85.)

II. ARE THE PROVISIONS FOR THE TAXATION OF MINING CLAIMS IN ACCORDANCE WITH THE AMENDMENT TO THE ORGANIC ACT OF JUNE 3, 1948? (Appendix B, page 63 of Appellant's Brief.)

The Act of Congress of June 3, 1948 (62 Stat. 302, 48 USCA Sec. 78) gives the Legislature the power to value unpatented mining claims and nonproducing patented mining claims which are also

unimproved, at the price paid the United States therefor, or at a flat rate fixed by the Legislature, etc.

The Property Tax Act values these claims at "$500.00 per each 20 acres or fraction of each such claim". We grant appellant's suggestion that it is very difficult, if not impossible, to ascertain the true and full value of a non-producing and undeveloped mining claim, and that it was proper for Congress to permit the Legislature of Alaska to value these claims for the purpose of taxation at a flat rate. However, we contend that $500.00 per each 20 acres or fraction of each such claim, is not at a flat rate.

The District Court, in its opinion, calls attention to the definition of the word "flat" as being "absolute; unvarying; exact; even". This definition is taken from Webster's International Dictionary, Second Edition. (R. 51.) The method provided in the Property Tax Act for taxing these mining claims is neither at so much a claim, which would be a flat rate, or so much per acre, which might be a flat rate. A full-sized lode mining claim contains 20.611 acres. The value placed on that claim by the law is not on an acreage basis, nor is it on a claim basis. Here again we find an example of haste in the passage of the law, and we cannot see how it can be remedied by judicial interpretation. If one had a claim of exactly 10 acres it might be contended that the value should be $250.00, which is at the rate of $500.00 for each 20 acres, although the law does not read "at the rate" of $500.00 per each 20 acres. But if one has a claim of 20.5 acres, it is impossible to know at

what rate it is to be valued. We have $500.00 for the first 20 acres, but what would be the value placed on the remaining .5 acres? Would it be another $500.00 or would it be $25.00? Anyway you take it, it is not uniform, and the same Act of Congress which permits taxation of mining claims at a flat rate also provides that all taxes shall be uniform upon the same class of subjects. Many mining claims are full-size lode claims or full-size placer claims, and many others are what is known as fractional claims, which might consist of anything from a fraction of one acre to 20 acres. The best that can be said for this provision is that it is so ambiguous as to be unenforcible, and how any portion of it can be disregarded for the purpose of interpretation it is difficult to see.

Counsel suggests that the words "or fraction of each such claim" are ambiguous and that they may be stricken out by the Court under the severability provision of the Act. However, let us see where that would leave us. The law would then read "$500.00 per each 20 acres" but what about a smaller area, say of two or three acres? If 20 acres is used as a unit, what becomes of a claim smaller than 20 acres? What did the Legislature intend? It is impossible, from the language of the Act, to ascertain just what they did intend. The Legislature had the power to value claims at a flat rate, and when so valued the tax applied must still be uniform. Congress must have meant that the Legislature could value mining claims at either so much per acre or so much per

claim, and the Legislature has, in its haste, failed to heed the provision of the amendment to the Organic Act.

The cases cited by counsel on pages 33 and 34 of his brief are authority for applying the modern rule of severability and nothing more. We can agree with these authorities, but we cannot see how the rule of severability can be applied in this case, where it is impossible to find the legislative intent from the language of the statute, and where the Court, in order to correct the mistake, would be required, in effect, to set up a wholly new rate of taxation of mining claims. There is actually no ambiguity in the language used in the Act, the pertinent part of which is "$500.00 for each 20 acres or fraction of each such claim". There is nothing for the Court to construe. The language means that the value shall be $500.00 for each 20-acre claim and $500.00 for a fraction of such claim, no matter how small. We submit that such a basis of valuation is arbitrary and unenforceable and by no means on the basis of a "flat rate".

III. DOES A COURT OF EQUITY HAVE JURISDICTION TO ENJOIN THE ENFORCEMENT OF THE TAX UNDER THE PLEADINGS AND EVIDENCE IN THIS CASE?

We grant that a Court of Equity has no jurisdiction in such cases if there is an adequate remedy at law. The appellees, in their complaints, alleged: (1) That they had no adequate remedy at law; (2) that they would suffer irreparable injury unless the de-

fendant were enjoined; (3) that the law created a cloud upon the title of their property which could be removed only by a Court of Equity; (4) equitable jurisdiction was necessary to prevent a multiplicity of actions. The proof abundantly supported all of these allegations:

(1) There is no remedy at law.

There is no remedy at law unless the remedy is certain and complete. The Supreme Court of the United States has uniformly followed this rule. *Hynes v. Grimes Packing Company and others,* 93 U.S. Law Edition 964; *Hillsborough Township v. Cromwell,* 326 U.S. 620; *Raymond v. Chicago Union T Company,* 207 U.S. 20; *Southern California Telephone Company v. Hopkins,* 275 U.S. page 393; 13 F. (2d) pp. 814 and 815. In the case of *Terrace v. Thompson,* 263 U.S. 197, it is stated:

> "The unconstitutionality of a State law is not of itself ground for equitable relief in the Courts of the United States. That a suit in equity does not lie where there is a plain, adequate and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be as complete, practical and efficient as equity could afford."

The Supreme Court of the United States has very recently stated the rule in *Hynes v. Grimes Packing Company* and others, supra, as follows:

> "If respondents show that they are without an adequate remedy at law and will suffer irreparable injury unless the enforcement of the alleged

invalid regulation is restrained, a civil court will enjoin."

The only Alaska statute authorizing the refund of taxes paid under protest is that found in A.C.L.A. Sec. 48-7-1(a). That statute reads:

"(a) (Tax Paid under Protest.) Whenever any taxes shall have been paid to the Tax Commissioner under protest and such taxes shall have been covered into the treasury, and the taxpayer or taxpayers involved have recovered judgment against the Tax Commissioner for the return of such tax, or where, in the absence of such judgment it shall become obvious to the Tax Commissioner, that such taxpayer would obtain judgment against the Tax Commissioner for recovery of such tax if legal proceedings therefor were prosecuted by him, it shall be the duty of the Tax Commissioner, if approved by the Attorney General and the Treasurer, to issue a voucher against the general fund of the Territory for the amount of such tax in favor of such taxpayer."

This statute does not constitute any remedy to one who might pay the Alaska property taxes under protest. It will be noted that the remedy in this section is discretionary, and it provides only for the issuance of a voucher against the general fund of the Territory if this is approved by the attorney general and the treasurer. The duty imposed upon the tax commissioner under this section is only to issue a voucher if and when the attorney general and the treasurer might be pleased to approve its issuance.

The District Court found that this statute would not afford any remedy at law to the appellees. (R. 69.) Even if this statute constituted a remedy at law it would not apply to taxes paid in accordance with Chapter 10 of the Session Laws of 1949 within municipalities, school and public utility districts, for as to all these there is no provision in the law applicable thereto which permits the payment of taxes under protest, or recovery under any circumstances.

Again, if this statute were mandatory and required the tax assessor to refund taxes paid under protest under an invalid law, still since there is no provision for the payment of interest, the statute cited hereinabove would not constitute an adequate remedy at law because no interest is provided. That question is discussed by this Court in the case of *Southern California Telephone Company v. Hopkins,* 13 F. (2d) 814 and 815, and in *Hopkins v. Southern California Telephone Company,* 275 U.S. 393, which affirmed this Court. The Supreme Court there said:

> "In no permitted proceeding at law could interest upon payment be recovered for the time necessary to obtain judgments. * * * We find no clear, adequate remedy at law. The equity proceeding was permissible".

See, also:

Educational Film Corp. v. Ward, 282 U.S. 379.

Appellant sites a number of authorities in his brief, typical of which is the case of *Mathews v.*

Rogers, 284 U.S. 521. In that case, equitable jurisdiction was denied, not upon a state of facts similar to that existing here, but on the ground that the law of Mississippi, which was involved, provided for an adequate plain and complete remedy at law.

It is true that in our complaints we alleged, as appellant states in his brief, that the Territory was insolvent and would be unable to refund taxes paid under protest in any event. However, when it came to the time of trial, it appearing that the Territory was quite solvent and that it has been so ever since, we attempted to introduce no proof on that point and abandoned it at the trial.

2. **Plaintiffs would suffer irreparable injury unless the defendant were enjoined.**

It follows from what has been said under the preceding paragraphs that the plaintiff and intervenor would suffer irreparable injury under the circumstances alleged and proved, unless a court of equity interposed and issued an injunction. The taxes were not paid, and if they had been paid under protest we would have had no remedy at law. If not paid and the injunction were not issued, the tax commissioner, as admitted in the pleadings, would have proceeded against the property of plaintiff and intervenor to enforce the lien provided by the law. Plaintiff and intervenor had one of two courses open to them. First, to pay the tax and submit to an invalid law, which would result in irreparable injury, or, second, refuse to pay the tax and suffer the loss of their

property, and the penalties provided. Either of these courses would have resulted in irreparable injury.

The imposition of the Alaska property tax upon plaintiff and intervenor, places a lien upon their property and subjects them to certain penalties for non-payment of the tax, and if they do not pay the tax assessed their property is subject to foreclosure of tax lien and sale, without any provision for redemption. So far as property outside of municipalities and school districts is concerned, the law makes no provision for contesting the validity of the tax in any court.

The law is wholly lacking in the ordinary provisions for taking such cases before a board of equalization and then appealing in an orderly manner to a court of law. In such cases, the jurisdiction of a court of equity is properly invoked.

Gibbs v. Buck, 307 U.S. 66;

Wagner Electric Corporation v. Hydraulic Brake Co., 257 N.W. 884;

Winslow v. Fleischner, 223 P., p. 922.

Smith v. Shibeck, 24 At. (2d) p. 795;

Westmoreland Coal Co. v. Rothensies, 13 F. Supp. p. 321.

"Where a suit is not essential to the collection of a tax and no action lies to recover back the tax if paid, equity has jurisdiction to determine the legality of the tax, and enjoin the collection if illegal."

Pacific Export Co. v. Seibert, 44 Fed. 310: Affirmed 142 U.S. 339.

3. **The levy of this tax creates a lien on the property of plaintiff and intervenor which constitutes a cloud on the title of their real property.**

The lien attaches from the date of assessment and it is a first and paramount lien and is not affected by any sale or transfer of the property. (Sec. 34, Alaska Property Tax Act.) If the tax is invalid, surely the lien is a cloud on the title which cannot be removed except in a court of equity.

We can agree with appellant that if a remedy at law is available, no action in equity will lie to remove the cloud of a tax lien. We think, however, that it clearly appears there is no remedy at law. It is argued that it is not reasonable to assume the attorney general and treasurer will refuse to approve a voucher if it should be issued by the tax commissioner to refund taxes paid under protest, and it is not reasonable to assume that a local Court would not allow the recovery of interest on such refund, notwithstanding the absence in the statute of a provision for any such recovery. One is not obliged to speculate and assume that any official will do something which the law does not require him to do; and the Courts must take the law as it is written and not as it should be. Such statutes as Sec. 48-7-1(a) ACLA certainly do not afford that "plain, adequate and complete" remedy which the Courts have uniformly held necessary as a ground for denying equitable relief.

> "A suit in equity may be maintained by an owner of tracts of timber lands, where a cloud is

> cast on the title by the attempt of the Board of Supervisors to assess and collect an invalid tax, unless there is a plain, adequate and complete remedy at law, and if it be doubtful whether there is an adequate remedy at law, the court of equity will take cognizance."
>
> *Gammill Lumber Co. v. Board of Supervisors,* 274 Fed. 630 (Nev.)

This Court has held in *King County, Wash. v. Nor. Pac. Ry. Co.,* 196 F. 323, that:

> "A court of equity has jurisdiction of a suit to enjoin the collection of a tax where it is alleged that the tax is illegal and throws a cloud on the title of real property, and its enforcement will produce irreparable injury."

although in that particular case, it appeared that the tax was valid. See also, *Port Angeles Western R. Co. v. Clallam County,* 20 F. (2d) 202, decided by a three judge Court in Washington.

4. Equity jurisdiction was necessary to prevent a multiplicity of suits.

Since plaintiff has property in three taxing units or districts, namely the city of Fairbanks, the Fairbanks school district, and in the Territory outside those districts; and the intervenor has property in five taxing units, namely, the cities of Juneau and Douglas, the Juneau Independent School District and the Douglas Independent School District, and in the Territory outside those districts, and different methods are provided in the law for the assessment, collec-

tion and enforcement of the tax in each one of those different taxing units or districts, which methods are not by any means uniform, different suits are necessary and wholly different procedure required to contest the validity of the law. In the several municipalities and school districts, delinquent tax rolls are filed in the Courts, notices are published, and the taxpayer may come into the Court and contest the tax. The dates of these proceedings vary with the different ordinances. If the taxpayer gets no relief through the Court and does not pay the tax, the property is sold, but he has a two-year period of redemption. Separate Court proceedings would be necessary in each city and school district where the taxpayer owns property.

In the Territory outside cities and school districts, a wholly different procedure is set up in the tax law, which gives the taxpayer a right to appear in Court only when the Territory undertakes the foreclosure of a lien on his property. He is powerless to move in the matter at all except through the invocation of the aid of equity. The Territory may move when it pleases, and in the meantime there is a cloud on the title of his property. And if the lien is foreclosed, there is no equity of redemption. Surely a multiplicity of suits would be necessary for both plaintiff and intervenor.

Confronted with such a situation, equity should afford relief.

Lee v. Bickell, 292 U.S. 415;

So. Cal. Telephone Co. v. Hopkins, 13 F. (2d) 814-815;
Davis Mfg. Co. v. Los Angeles, 189 U.S. 207;
Davis v. Forrestal, 144 N.W. 423.

The fact that the municipalities and school districts involved in this action did not assess or collect the Territorial tax in 1949, and that plaintiff and intervenor paid their city and school district taxes that year, would not seem to affect this ground of their complaints, for the law continues in the statutes and the threat of its attempted enforcement in the future by the cities and school districts, with all its imperfections, infirmities, inconsistencies, and lack of uniformity, remains; and to even attempt to test it in any other manner than by injunction would involve three suits on the part of plaintiff and five on behalf of intervenor.

IV. OTHER DEFECTS WHICH WERE ALLEGED IN APPELLANT'S COMPLAINTS AND WHICH ARE APPARENT ON THE FACE OF THE LAW.

In addition to the points raised in the appellant's brief, there are two other questions arising on this appeal relating to matters appearing on the face of the Alaska Property Tax Act and in the pleadings and evidence which we think should be discussed. We understand it to be the rule that such points should be raised and discussed where they tend to support the trial Court's decision, and that this Court will hear argument on anything which sustains the lower

Court's judgment. These two questions are: (1) Absence of any Territorial board of equalization; and (2) invalidity of the tax on boats and vessels.

(1) The District Court, in its opinion, said that the lack of a Board of Equalization would not in itself show a lack of uniformity in the tax imposed by Chapter 10. (R. 52-53.)

It may be true that the lack of a board of equalization may not of itself show a lack of uniformity in the tax assessed for it might be within the realm of possibility that all of the several independent assessors in the numerous taxing units or districts, consisting of the municipalities, school and public utility districts and the Territory outside those districts, in some miraculous way would value all property subject to the law on exactly the same basis; but how could a taxpayer, in the absence of a Territorial equalization board, determine whether the tax levied is uniformly assessed? Plaintiff and intervenor are entitled to uniformity in the law. If the law deprives them of any method of determining uniformity, it would seem to strike at the root of their rights. The lack of such a board deprives them of their rights in that respect.

The law provides for four divisional boards, one in each judicial division, and none of these boards has any jurisdiction over property situated in municipalities, school and public utility districts. It also provides for four assessors, one in each division, to assess the property outside municipalities, school and public utility districts. They have no connection with each other. If plaintiff, for instance, has a Diesel

engine outside the City of Fairbanks and outside the Fairbanks school district, the Territorial assessor may value it at $5,000.00, while an exactly similar engine situated within the City of Fairbanks may be valued at $1,000.00 by the municipal assessor; or one piece of property might be valued at one sum in one judicial division, and at an entirely different sum in another judicial division. That would hardly be uniform; but the plaintiff has nowhere to go to seek equalization. Such a law makes uniformity impossible. It forces a taxpayer in one taxing unit to submit to the valuations made by the assessor for that unit or district, without regard to even their approximate uniformity with values in other taxing units. It deprives the taxpayer of the ordinary and necessary remedy at law to which he is entitled. It is well settled that every taxpayer has a right to complain and to seek redress through a properly constituted board or in the Courts if his property is over-valued by the assessor. The Legislature has provided for a measure of uniformity within each separate city and school district and within each separate judicial division outside cities and school districts, but the Legislature has only such power as is granted to it by the Organic Act, and nowhere in the Act is there any authority for attempting any form of uniformity except on a Territorial-wide basis. Territorial equalization is necessary to gain uniformity.

In *Railroad & Telephone Co. v. Board of Equalizers,* 85 F. 302, it is held that where assessments are made by different boards, and where there is a consti-

tutional requirement of uniformity in taxation, the State is required to provide for equalization of assessments made by different boards in order to insure that the same measures of value shall be applied to all property. On this point the Court said:

> "It is obvious enough that if the State adopts a system of taxation by which assessments are made through different officers, agencies or boards, the State is equally represented by every such board or agency, and, so far as substantial results are concerned, the case is just the same as if the State acted through one board only * * * If there is a discrimination against different species of property imposing an unconstitutional burden thereon, the result cannot be sustained, and this is equally so whether such a result is due to erroneous action by the board or to defect in the legislation in not requiring equalization and furnishing the means whereby this might be made real and effective."

The requirements of uniformity are generally understood to mean geographical uniformity throughout the Territory to which the tax applies. This Alaska tax must be uniformly assessed throughout Alaska. The statute must guarantee that uniformity. This statute, on its face, would deny it. In the case of *Huron-Clinton Met. Au. v. Board of Supervisors,* 8 N.W. (2d) p. 84, we find the following language:

> "What is meant by the words 'taxation by uniform rule?' And to what is the rule applied by the Constitution? * * *
>
> Taxing by uniform rule requires uniformity not only in the rate of taxation, but also uniformity

in the mode of assessment upon the taxable values. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation. But this is not all. The uniformity must be co-extensive with the territory to which it applies. If a State tax it must be uniform all over the State; if a county, town or city tax, it must be uniform throughout the extent of the territory to which it is applicable. * * * The purpose of state equalization is to correct improper application of the true cash value rule and resulting variations in assessments as between counties."

See, also:

61 *C.J.*, *"Taxation,"* Sec. 65;

Maclty v. Tantges, 52 N.W. 858;

Redman v. Wisenheimer, 283 P. 363, 102 Cal. App. 488;

61 *C.J.*, *"Taxation,"* Sec. 922;

People v. Orris, 133 N.E. 787;

Huidekoper v. Hadley, 177 F. 1;

United Globe Mines v. Gila County, 100 Pac. 744.

Equalization, therefore, is necessary to assure uniformity.

It might be contended that since no over-valuation of the property of either plaintiff or intervenor is involved in this case, the lack of a Territorial equalization board is immaterial. However, the lack of such a board shows the impossibility of first exhausting ad-

ministrative remedies before applying to a court of equity for relief. That impossibility arises because the usual and necessary administrative remedies are absent from the Alaska law. There is a complete denial of any method of testing and determining uniformity of valuation through administrative steps. The main issue in this case is lack of uniformity, which appears on the face of the law, and this applies both to the lack of uniformity in the tax itself within the different taxing districts or units, and the lack of any provision for assuring uniformity of assessment. Whether uniformity of assessment was attained in the four judicial divisions in 1949 is a question of fact, and that question can not possibly be determined because of a denial to taxpayers of any agency through which they might have assessments equalized.

(2) After the Alaska Property Tax, Chapter 10 of the Session Laws of 1949, was passed, and at the same session, the same Legislature passed Chapter 88, which is an amendment of Section 3 of Chapter 10 of the Alaska Property Tax Act.

Chapter 88 changes the basis of valuation on boats or vessels engaged in marine service on a commercial basis. A copy of Chapter 88 is set forth in appellant's brief at page 62. Under this amendment to the Property Tax Act, the owners of boats and vessels are given the option of paying the tax either on the basis of the value of the vessel or at $4.00 per net ton, with a minimum of $20.00 on any one boat or vessel.

The validity of this amendment was attacked in the complaint and in the complaint in intervention. The

Court below declined to pass on the validity of this amendment. See Conclusion of Law No. 1. (R. 84.) In that conclusion, the Court said it would not consider whether Chapter 88 is valid or invalid. The reason given for this action by the Court for this conclusion was that since the plaintiff had no boats or vessels and intervenor's boats and vessels had been taxed by the Juneau Independent School District and the taxes paid thereon, neither plaintiff nor intervenor was in a position to complain of the amendment.

However, while intervenor might not have been in a position to complain, the record shows that the intervenor was permitted to pay a tax on some of its vessels at the rate of $4.00 a ton, and that all owners of vessels had a similar option, while plaintiff, who owned property of a different nature, did have his property valued at its full and true value. In other words, this amendment, on its face, shows that the Legislature ignored the provisions of the Organic Act in applying the alternative tax to boats and vessels. The Organic Act provides that *all* taxes shall be uniform, and that the assessments of property shall be at its true and full value. Taxing boats on a tonnage basis is in disobedience of the mandate of the Organic Act, and it destroys the uniformity of the tax.

We think it requires the citation of no authorities in addition to those which we have hereinabove cited to sustain this point.

Again we find the requirements of uniformity ignored in subdivision (b) of Section 1 of Chapter 88.

where a minimum tax is imposed on each boat or vessel of $20.00 per annum. That does not apply to the tonnage tax alone, but to the whole tax levied by Section 3 of Chapter 10, and therefore a boat valued at $1,000.00, having a registered net tonnage of 2 tons, would pay not 10 mills, but 20 mills.

CONCLUSION.

Appellant bases his argument on the proposition that legislatures have been allowed broad powers of classification of property for purposes of taxation, that the Legislature of Alaska in enacting Chapter 10, Session Laws of 1949, with its two different systems of taxation, one of which we contend amounts to wholesale exemption of most of the taxable property in the Territory, was merely exercising the right of classification; that this so-called classification has a reasonable basis; and that equity has no jurisdiction to enjoin the enforcement of the tax.

We shall not attempt to analyze the list of cases cited in appellant's brief, but will agree that broad powers of classification may be exercised in taxing property; that equity will not avail if there is a plain, adequate and complete remedy at law; that it may not be invoked to remove a cloud on the title of property where a remedy at law exists.

Typical of the cases cited by appellant in support of the power of classification is *Madden v. Kentucky,*

309 U.S. 83; but as we have pointed out hereinabove, that case does not involve geographical classification of property within the confines of a state. It is apparent that the classification there was based on difficulty in discovering the property and in collecting the tax. It did not arise under any constitutional provision requiring that all taxes shall be uniform and based on true and full value.

The case of *Mathews v. Rogers,* 284 U.S. p. 581, is typical of cases cited in support of the claim that equity will not enjoin where there is a plain, adequate and complete remedy at law. This is granted; but in that case there was a remedy at law.

The case of *Shaffer v. Carter,* 252 U.S. 37, and others cited on the subject of equitable jurisdiction in the removal of a cloud on title created by an invalid taxing statute, go only to hold that equity will not intervene where there is a legal remedy. This is also granted.

The case of *Royster Guano Co. v. Virginia,* 253 U.S. 412, cited by appellant at pages 9 and 27 of his brief, does not seem to support him on any ground, and it illustrates what we have said. In that case the legislature of Virginia sought to impose an income tax, whether on business done within or without the state, on all corporations doing business in the state. Another statute exempted from taxation all corporations organized or incorporated in the state, but which transacted no business in the state except the hold-

ing of stockholders' meetings, etc. The appellant resisted the attempted collection of the tax on its income earned outside the state. The Courts of Virginia held the tax to be valid, but the U. S. Supreme Court reversed and remanded the case. The Court stated that while there is a wide latitude of discretion allowed in classification of property, and in granting total or partial exemptions on grounds of policy,

> "nevertheless a discriminatory tax law cannot be sustained against the complaint of the party aggrieved if the classification appear to be altogether illusory. * * * It is obvious that the ground of difference on which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect."

The trial Court held the Alaska Property Tax Act invalid except as to the amendment contained in Chapter 88, Session Laws of 1949, which portion of the Act the Court held was not involved in this case. Although we think and urge upon the Court that Chapter 88 could not stand alone after the sections which it purported to amend have been declared invalid, and that it also is contrary to the provisions of the Alaska Organic Act.

We submit that every defect we have mentioned hereinabove appears in the law and on the record made, and the District Court was right in holding the

law to be invalid. The injunction issued against the appellant was amply justified.

Dated, Juneau, Alaska,
January 3, 1951.

Respectfully submitted,

H. L. Faulkner,
Medley & Haugland,
Collins & Clasby,
Faulkner, Banfield
& Boochever,
Attorneys for Appellees.

No. 12,675

IN THE

United States Court of Appeals

For the Ninth Circuit

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,
Appellant,

vs.

LUTHER C. HESS and ALASKA JUNEAU GOLD MINING CO., a corporation,
Appellees.

Upon Appeal from the District Court for the Territory of Alaska, Fourth Division.

REPLY BRIEF FOR THE APPELLANT.

J. GERALD WILLIAMS,
Attorney General of Alaska,
JOHN H. DIMOND,
Assistant Attorney General of Alaska,
Juneau, Alaska,
Attorneys for Appellant.

Subject Index

Page

I. Appellees have failed to refute the points made by appellant that uniformity and equal protection are identical in their requirements and that there are sufficient differences, under such requirements, to justify the classifications adopted by the legislature 2

A. The absence of judicial decisions on cases exactly in point does not establish the invalidity of the Act... 2

B. Appellees have failed to make any showing that the Act either in its purpose or practical operation effects any unconstitutional discrimination 4

II. The other points raised by appellees but not considered in appellant's brief do not sustain appellees' claim that the Act is invalid 7

A. The absence of provisions in the Act for an over-all board of equalization does not cause the Act to fail for lack of uniformity 7

B. The validity of Ch. 88 S.L.A. 1949, which amends Ch. 10 S.L.A. 1949, cannot now be questioned by appellees 9

Conclusion 11

Table of Authorities Cited

Cases

	Pages
Alaska Steamship Co. v. Mullaney, 180 F. (2d) 805	9
Ashwander v. Tennessee Valley Authority, 297 U. S. 288	9
Charleston Assn. v. Alderson, 324 U.S. 182	9
General American Tank Car Corp. v. Day, 270 U. S. 367	6
Lent v. Tillson, 140 U. S. 316	9
LeTulle v. Scofield, 308 U. S. 415	10
Madden v. Kentucky, 309 U. S. 83	2
Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283	4
Metropolis Theatre Co. v. Chicago, 228 U. S. 61	7
Michigan Central R. R. Co. v. Powers, 201 U. S. 245	4, 9
Michigan R. R. Tax Cases, 138 F. 223, affmd. 201 U. S. 245	8, 9
Morley Co. v. Maryland Casualty Co., 300 U. S. 185	10
Travelers Ins. Co. v. Connecticut, 185 U. S. 364	7
U. S. v. American Rwy. Express Co., 265 U. S. 425	10

Statutes

Alaska Organic Act, Section 9	2
Chapter 10, Session Laws of Alaska, 1949	2, 3, 8, 9, 11
Chapter 88, Session Laws of Alaska, 1949	9, 10, 11

No. 12,675

IN THE

United States Court of Appeals

For the Ninth Circuit

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,
Appellant,

vs.

LUTHER C. HESS and ALASKA JUNEAU GOLD MINING CO., a corporation,
Appellees.

Upon Appeal from the District Court for the Territory of Alaska, Fourth Division.

REPLY BRIEF FOR THE APPELLANT.

This brief has been prepared as a reply to the arguments advanced in appellees' brief, pp. 11-22, and to the two additional points, not discussed by appellant in his opening brief, which have now been raised by appellees in their brief, pp. 35-42.

I. APPELLEES HAVE FAILED TO REFUTE THE POINTS MADE BY APPELLANT THAT UNIFORMITY AND EQUAL PROTECTION ARE IDENTICAL IN THEIR REQUIREMENTS AND THAT THERE ARE SUFFICIENT DIFFERENCES, UNDER SUCH REQUIREMENTS, TO JUSTIFY THE CLASSIFICATIONS ADOPTED BY THE LEGISLATURE.

A. The absence of judicial decisions on cases exactly in point does not establish the invalidity of the Act.

It is not enough to demonstrate the invalidity of the Act that there have not been discovered any judicial decisions wherein an identical taxing statute was considered with reference to a uniformity clause similar to that contained in Section 9 of the Organic Act. Consequently it is not at all relevant to a decision on the validity of the classifications adopted in this Act that the case of *Madden v. Kentucky,* 309 U.S. 83, was not decided on a state of facts similar to the case being considered here or that there have not been discovered any court decisions holding that a law identical with Ch. 10 S.L.A. 1949 meets the requirements of the Fourteenth Amendment. *Madden v. Kentucky,* supra, and other Supreme Court cases involving a construction of various taxing statutes as they relate to the equal protection clause in the Fourteenth Amendment were cited by appellant in his opening brief not to show that such cases involved identical fact situations but to demonstrate merely that when a government exercises its power of taxation, it has the greatest freedom in deciding how to best distribute the burdens of government by means of classifications. The point made by appellant was that uniformity and equal protection are essentially identical in their exactions, that a great variety of

classifications can be adopted by a legislature as long as they are not arbitrary and if a state of facts can be conceived to justify a difference in treatment between the different classes, that in making classifications the legislature does not have to achieve scientific uniformity, and that there appears no good reason (in spite of a lack of judicial authority) why the requirements of equality and uniformity should be any more restrictive with respect to ad valorem taxes than to income or excise taxes. This point appellees have failed to answer.

Also it is not as evident as appellees contend that "the Alaska law was designed to exempt from the tax all property within municipalities and school districts" (Appellees' Brief, p. 13). The Act is explicit in levying a 1% tax "upon all real property and improvements and personal property in the Territory" (Ch. 10 S.L.A. 1949, Sec. 3). Under this apparently mandatory language, the first ten mills of tax that the cities and school districts assess and collect would be that levied by the Territory and not by the local taxing units irrespective of the amount of tax that the local units had established as their levy under their local ordinances.

However, even if the Act could be interpreted so as to sanction a virtual exemption from the territorial tax of the cities and school districts, there would be nothing unconstitutional in this; for if there are sufficient differences between Class I and Class II property to justify different procedures for assessment and collection of the tax, then it would follow logically

that these differences would also justify a variation in the rate of the tax itself. See *Mich. Central R. R. Co. v. Powers,* 201 U.S. 245, 300. Contrary to what appellees maintain is the law (Appellees' Brief, p. 14), an exemption from taxation is not something different from a classification since "the right to make exemptions is involved in the right to select the subjects of taxation and apportion the public burdens among them * * *" *Magoun v. Illinois Trust & Savings Bank,* 170 U.S. 283, 299.

B. Appellees have failed to make any showing that the Act either in its purpose or practical operation affects any unconstitutional discrimination.

The soundness of appellant's demonstration in his opening brief that there are substantial differences between Class I and Class II property reasonably justifying differences in treatment and thus sufficient to allow different methods of assessment and collection of an ad valorem tax (Appellant's Brief, pp. 16-24) has not been refuted or even disturbed by anything appellees have advanced in their answer (Appellees' Brief, pp. 14-18). For appellees to show what the value of taxable property is in the City of Fairbanks and the Fairbanks Independent School District, how much money would be raised by imposing a 1% tax on this property, and to then compare this sum with the total school budget for that area really demonstrates nothing that has any logical relevancy to the argument advanced by appellant. The relevant facts to be considered here are these:

(1) That in a 14-year period between 1934-1948 persons residing in Class I areas (incorporated cities and towns and school districts) were obliged to pay by way of local ad valorem taxes one-third of the cost of their schools, while the territorial government contributes the remaining two-thirds. (R. 150.)

(2) That during this same period, persons residing in Class II areas (territory outside of incorporated cities, towns and school districts) paid no ad valorem taxes whatsoever and contributed nothing directly to the support of their schools, but received from the Territory not merely two-thirds but complete support for their schools. (R. 150.)

(3) That the record in this case shows that the ad valorem tax levy in the Juneau Independent School District and the City of Juneau for school purposes was seven mills in 1948 and seven mills in 1949 (R. 101-102); in the City of Douglas and the Douglas Independent School District twelve mills in 1948 and ten mills in 1949 (R. 106-107); in the City of Fairbanks and the Fairbanks Independent School District six mills in 1948 and ten mills in 1949—an average of approximately nine mills for school purposes during this two-year period in the cities and school districts involved in this case.

(4) That since the enactment of the Alaska Property Tax Act, those persons residing in Class II areas outside of incorporated towns, cities and school districts now are obliged to pay an ad valorem tax of ten mills, an amount which presumably could be

considered as reimbursement to the territorial government for the particular advantages that those persons in Class II have received by reason of residing there and not within incorporated cities, towns and school districts.

In the light of these facts, how can it in all seriousness be contended that a ten mill tax on property that never before has been subject to an ad valorem levy is so lacking in equality and uniformity as to violate constitutional prohibitions? At the very least there is sufficient here to suggest that the two classes can be treated differently and that there may be validly applied to each a different tax law. This is sufficient to create a presumption that this legislative scheme of attaining an equitable distribution of the burden of government is constitutional, and appellees have completely failed to produce any facts which would tend to negative the basis of this legislative arrangement. See *Madden v. Kentucky,* 309 U.S. 83, 88. There is then no purpose to discriminate between appellees' property in Class I and their property in Class II disclosed on the face of the Act itself, and appellees have failed to show that in fact such classification operates to effect any discrimination or in any way to injure appellees. Cf. *General American Tank Car Corporation v. Day,* 270 U.S. 367, 372-375.

Since the Act, therefore, is fair and reasonable in its purpose and practical operation, its invalidity is not established by possible failure to achieve equality of taxation with mathematical exactitude. *General American Tank Car Corporation v. Day,* supra, p.

373; *Travelers Ins. Co. v. Connecticut,* 185 U.S. 364, 371-372. As the United States Supreme Court stated in *Metropolis Theatre Co. v. Chicago,* 228 U.S. 61, 69-70, by Mr. Justice McKenna:

> "* * * To be able to find fault with a law is not to demonstrate its invalidity * * * The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only palpably arbitrary exercise which can be declared void under the Fourteenth Amendment * * *"

II. THE OTHER POINTS RAISED BY APPELLEES BUT NOT CONSIDERED IN APPELLANT'S BRIEF DO NOT SUSTAIN APPELLEES' CLAIM THAT THE ACT IS INVALID.

A. The absence of provisions in the Act for an over-all board of equalization does not cause the Act to fail for lack of uniformity.

In appellees' complaints it was alleged as an additional reason for the claim that the Act was invalid that "there is no method provided in the Alaska Property Tax Act nor in any law of the Territory for equalization of assessments as between different municipalities or taxing units or between any of these and outside areas, or between the outside areas in the several judicial divisions". (R. 13, 26.) A part of this contention, that is, the lack of the equalization between the four judicial divisions in Class II areas,

was not discussed in appellant's opening brief since the district court, in its opinion, held that the absence of a provision in the Act for a board of equalization to equalize the taxes of the various taxing districts in various judicial divisions did not in itself show a lack of uniformity. (R. 52-53.) Appellees, however, have now raised this point in their brief (Appellees' Brief, pp. 35-40), and appellant replies to this contention as follows:

(1) With respect to the lack of provision for equalization of provisions between Class I and Class II property and between the various taxing units within Class I, what has been already said by appellant in his opening brief obviates the necessity for any further argument on this point. (Appellant's Brief, pp. 23-27.) If the classifications adopted in the Act are proper and sufficient to justify different procedures for assessing and collecting the tax, then it follows that no equalization of assessments between these different classes would be required. See *Michigan R.R. Tax Cases,* 138 F. 223, 241, affmd. in 201 U.S. 245.

(2) Neither is it a valid objection that the Act does not provide for a territorial board of equalization to equalize assessments of Class II property among the four judicial divisions of the Territory. There is nothing here that deprives appellees of any of their constitutional rights. First of all, if a Class II taxpayer in any judicial division, after having had full opportunity for notice and hearing before his divisional board of equalization (Ch. 10, Secs. 23, 25,

27, 28), feels aggrieved by an order of such board, he has the right of appeal on a *de novo* basis to the district court. (Ch. 10, Sec. 31.) And this procedure certainly constitutes due process of law. *Lent v. Tillson,* 140 U.S. 316, 326-328; *Mich. Central R.R. Co. v. Powers,* 201 U.S. 245, 301-302. Secondly, as far as equal protection is concerned, although the lack of a central board of appeal may not be justified on the ground of any permissible classification as it was in the *Mich. R.R. Tax Cases,* 138 F. 223, 241, since there apparently is no basic distinction between any property within Class II whether it is located within one particular judicial division or another, yet there has been no showing by appellees that the tax in fact bears unequally on property within the same class and that such inequality is intentional and systematic. See *Charleston Assn. v. Alderson,* 324 U.S. 182, 190-191. Appellees, therefore, not having shown themselves to be injured by this alleged lack of uniformity, cannot assail the constitutionality of the Act in this respect. Cf. *Alaska Steamship Co. v. Mullaney,* 180 F. (2d) 805; *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346.

B. The validity of Ch. 88 S.L.A. 1949, which amends Ch. 10 S.L.A. 1949, cannot now be questioned by appellees.

Appellees raise the additional point that Ch. 88 S.L.A. 1949, which amends the Alaska Property Tax Act as far as is concerned the valuation of boats and vessels engaged in marine service on a commercial basis, is also invalid. This argument was made in the lower court by appellees but was decided adversely

to their contention. The trial court found that appellee Luther C. Hess had no boats, and that appellee Alaska Juneau Gold Mining Company had elected to pay the tax on its boats, and that, therefore, neither of the appellees had been injured by the amendment in Chapter 88. (R. 83-84, 65-66.) Hence the lower court, in its Conclusion of Law No. II (R. 84), stated "That neither the plaintiff nor the intervenor is in a position to assert that Chapter 88 of the Session Laws of Alaska 1949, is invalid, so this court will not consider whether said Chapter 88 is valid or invalid. What is said hereinafter is said as to property other than boats and vessels." Moreover, the judgment entered in the lower court expressly exempted from the injunction the tax on boats and vessels. (R. 90.)

In view of this record of the case, appellees' claim that Chapter 88 is invalid cannot be availed of here in the absence of a cross-appeal. Appellees are not attacking the lower court's reasoning in an effort to support the decree, but are attacking the decree of the lower court with a view of either enlarging their own rights thereunder or of lessening the rights of appellant, since what they want this court to do is to declare Chapter 88 unconstitutional—something that the lower court refused to do. Since appellees have not obtained the allowance of a cross-appeal in this matter, they cannot confer jurisdiction on this appellate court to consider and decide this question. *U. S. v. American Railway Express Co.,* 265 U.S. 425 435; *Morley Co. v. Maryland Casualty Co.,* 300 U.S. 185, 191; *LeTulle v. Scofield,* 308 U.S. 415, 421-422.

CONCLUSION.

For the reasons shown in appellant's opening brief and in this reply brief, it is respectfully submitted: (1) that the decree of the district court should be reversed to the extent that it holds that Chapter 10, Session Laws of Alaska, 1949, except as to boats and vessels under Chapter 88, Session Laws of Alaska, 1949, is invalid; and (2) that the case should be remanded to the district court for entry of a decree declaring Chapter 10, Session Laws of Alaska, 1949, to be valid in its entirety, dissolving the permanent injunction, and dismissing appellees' complaints.

Dated, Juneau, Alaska,
January 29, 1951.

Respectfully submitted,

J. GERALD WILLIAMS,
Attorney General of Alaska,

JOHN H. DIMOND,
Assistant Attorney General of Alaska,

Attorneys for Appellant.